

No. 13959

United States
Court of Appeals
for the Ninth Circuit.

VICTOR GOTHBERG, an individual doing business as GOTHBERG CONSTRUCTION COMPANY,
Appellant and Appellee,

vs.

BURTON E. CARR, JANE DOE CARR, his wife, JACK AKERS and SHERMAN JOHNSTONE,
Appellees and Appellants.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 377 to 775, inclusive)

Appeals from the District Court for the Territory
of Alaska, Third Division

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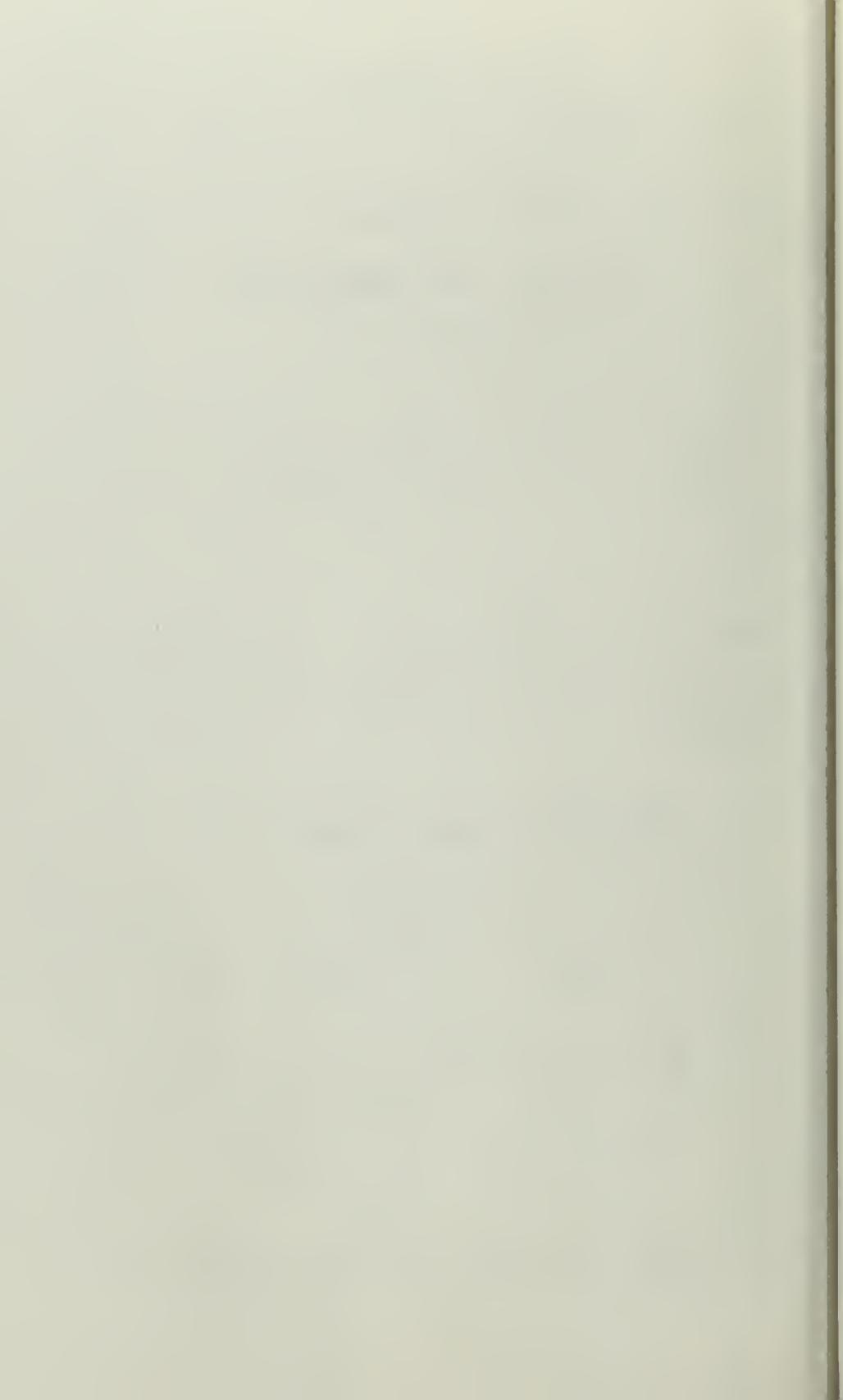
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(Testimony of Burton E. Carr.)

Q. But did the concussion cause those glasses to fall out of the moldings?

A. No, it didn't cause them to fall out.

Q. Yesterday, you described how the front of the building had [323] fallen away someway, Mr. Carr. Will you go through that again for me, please?

A. Well, the steel down below there—when this was fastened on on the front of the building it wasn't tied properly—and the wires wasn't put in there in such a way I had it explained to me where it should have been—so they wasn't ready for concrete—to pour those pilings for the window frame—and the men working there didn't want the concrete poured yet, because it wasn't ready, and Mr. Gothberg told them to go ahead—and they poured the concrete anyway.

Q. You referred to a bad crack in the wall yesterday. Where is that in relation to the front of the building on Fifth Avenue?

A. I believe it's right over the main window. It's about half or three-quarters from the door—it is cracked all the way down—straight cracks. The building right next to where I live is 20 feet longer, and it is the same height all the way through the building—and I examined that building 2½ years ago—and there is one slight place where you have to have glasses to see it's cracked on that wall—and my building is cracked all over—and that building was built in the cold weather—but it is covered—and that is the paint store right next door

(Testimony of Burton E. Carr.)

to the Church of the Open Door—and I examined that this morning, and one side, I couldn't see any cracks at all—and the one I had is cracked [324] all over.

Q. Where is this store you refer to?

A. Next door to the Church of the Open Door.

Q. On Fourth Avenue?

A. Fourth Avenue—20 feet longer—same height.

Q. It is also built out of concrete block?

A. Pumice block—the same type of block.

Q. To get back now, Mr. Carr, to the crack you have referred to. Does that run up through the bricks, also?

A. It runs right up through the bricks there. I looked inside, and I couldn't see any tied wires in between the blocks.

Q. Has the wall separated from the west wall at the corner? A. It's separated, yes.

Q. It has?

A. All the way from the top clear on down to the window on that corner. It goes like this—here's your window here, and the back windows are here, and here's where the line is, and from the window right on, it is cracked straight through. Also, on the foundation where it was joined, it is cracked there.

Q. That crack is in the center of the building. My question, Mr. Carr, was whether or not this north wall had pulled away from the west wall at the corner of the building?

A. Let's see—well, that is a question I can't answer you. [325]

(Testimony of Burton E. Carr.)

Q. You described the crack that runs up from the corner?

A. That is in the center of the building.

Q. And I asked you whether the walls had separated in the other corner over by the west wall?

A. That is the one I am talking about—the west wall. I can show you on the picture, here, if you would like. It's a lot easier—than I can explain it.

Q. I know where this one crack is. That's at a part of the building where it turns past the gas pumps.

A. There is several cracks all along the whole deal and the blocks are loose in between—just only the weight of the other blocks holding it in place.

Q. Has the mortar all fallen out of those?

A. No, the mortar is loose from the block.

Q. Is that north wall then, out of plumb, as Mr. Cupples testified yesterday?

A. That was the one that they had to tear down.

Q. Well, is the wall out of plumb, Mr. Carr?

A. I didn't put any plumb bob on it, or anything—the only thing I know it is cracked so many places it naturally wouldn't be straight right now.

Q. Do you contend, Mr. Carr, that this one crack, that you have described on the north wall, is the result of construction, as distinguished from workmanship, or vice versa?

A. It is workmanship and construction, both—because a number [326] of other buildings I looked at don't have that many cracks.

(Testimony of Burton E. Carr.)

Q. Is that the result of the so-called settling of the foundation that you have testified to?

A. I don't know exactly. You would have to get an engineer on the job to testify on that.

Q. I believe, yesterday, Mr. Carr, in response to one of Mr. Bell's questions, you said the foundation had sunk?

A. Yes, I remember. That was where he was supposed to connect the new foundation on the old. It wasn't properly connected and it did sink.

Q. Where is that?

A. The wall on the street—towards Denali—on that corner there—that's where the foundation is broken clean off.

Q. How about the blocks above the foundation—are they cracked, too?

A. Oh, yes, there's cracks all along there.

Q. Now, the east foundation was an old job. It was put in by Breeden and Smith a year before, wasn't it?

A. Yes, that was put in by Breeden and Smith a year before, yes.

Q. Now, are there any cracks in the blocks above that old portion of the foundation?

A. Yes, there's cracks in there, but the cause of those cracks is the mortar. It was so cold, and naturally the blocks contracted—then with a little heat they expand, and leave [327] floating blocks. The mortar isn't out, but you can see where it is cracked all around the blocks.

(Testimony of Burton E. Carr.)

Q. Do the cracks on that side also run through the blocks themselves?

A. Yes, but those blocks won't stretch anymore. Concrete block has so much tension.

Q. But those cracks in the blocks have occurred over the whole foundation, is that right?

A. Yes, that was on account of the foundation.

Q. On this freezing, Mr. Carr, do you mean the mortar froze to the block?

A. It was 20 below zero when they put those in—and when they would heat the mortar, and as soon as they put it on there, it would freeze solid—so they would have to try to break part of it off so they could set it down—and some of those blocks—the mortar was supposed to be between a quarter and a half inch, but some of that mortar is at least two inches wide.

Q. Where—could you point it out?

A. I couldn't right now. I could show you very easily.

Q. Did they have to chip the mortar off of the outside of the building later?

A. Is that another question?

Q. Yes.

A. There is a lot of places there that the mortar laps over in [328] different places, especially in the inside.

Q. In order to finish the outside of the building, did they have to go along and chop off the mortar that had come from between the blocks?

A. I think you got me wrong. This wide piece

(Testimony of Burton E. Carr.)

of mortar is in between the blocks. The blocks should be set up closer, but the mortar that's sticking out on the inside, you can see it in different places on the inside and outside of the building, especially around the windows there, or the sections above the windows and doors.

Q. How many places, Mr. Carr, in the walls themselves? Is the mortar two inches thick between the blocks?

A. I couldn't tell you how many places. I have noticed it in different places.

Q. Would you say several places?

A. Oh, yes.

Q. That is between the blocks themselves, as distinguished—

A. The blocks put up against one another.

Q. Did Mr. Gothberg furnish the kick plates that you testified to yesterday?

A. Well, after I called him up about it, about, oh, five or ten times, I guess he finally put part of them on there—not all of them.

Q. As I recall your testimony yesterday, there were two or three lacking? [329]

A. There was quite a few of them lacking. They were lacking on the men's restroom, the ladies' restroom, and the door that goes in between the show-room—and they are lacking kick plates on the outside of the front doors. I don't remember seeing any push plates on them.

Q. About the locks, Mr. Carr, did you put in solid brass locks?

(Testimony of Burton E. Carr.)

A. Yes, solid brass locks. I didn't put them in, but that's the ones I bought—regular front door locks.

Q. Were the ones you bought solid brass?

A. Solid brass, regular store front locks.

Q. Were the others usable, or did you just not like them?

A. Well, yes, we used the others in the office—and we tried to get them working several times, and they wouldn't work on the outside doors when he put them in—and Gothberg was in there several days trying to get them in the office—and he sent a mechanic down there to get them to work—and they finally replaced one of them—and the other one would lock in between the office and the outside—I would have to climb through the window—my wife couldn't get out—and I had to climb in there through the window and take a screw driver and open the door a number of times. I can prove it.

Q. Isn't it a fact that you lost the key to that lock?

A. Yes, there is a lock and key, but the key wouldn't work. I can bring it down and show you. He's worked on it, I don't know how many times, trying to tighten it up. [330]

Q. Yesterday you testified regarding the swinging double door between the showroom and garage?

A. Yes.

Q. Is that the kind of door that's in the specifications—a double door?

(Testimony of Burton E. Carr.)

A. A double door and one swinging door.

Q. The way they are installed, the one on the right hand only swings one way?

A. It only swings one way—and it should be a two-way swinging door.

Q. Did you discuss with Mr. Gothberg the installation of another type of door?

A. I told him, but he said that is all he could get.

Q. Did you accept installation of the door that is there?

A. No, I didn't accept it, but he said he would replace it if it wasn't satisfactory—and it never was satisfactory.

Q. Isn't it a fact, Mr. Carr, that you told him to put that door in there, referring to the one that is there now?

A. No, he put that in himself before I noticed they were already in place.

Q. Yesterday you testified regarding an intermittent motor on the heater, that was located where the partition originally was installed. Wasn't that motor provided by Anchorage Installation at a later date? A. It never was, no. [331]

Q. You are positive of that?

A. Absolutely sure of it.

Q. Yesterday, Mr. Carr, you referred to the door frame and the use of lead. What kind of lead do you mean?

A. It is supposed to be white lead that goes between where you set the door frames in, so the

(Testimony of Burton E. Carr.)

wind won't blow through them. It's supposed to be set in white lead.

Q. Isn't the purpose of white lead to prevent rust and deterioration, Mr. Carr?

A. No, because wood don't rust. It is to keep the air out and the wind—to set them in place.

Q. Actually, white lead was only called for on the floor plate of the door, was it not?

A. No, it was called for where the door opened—those door jambs, or door frames, or whatever you call them.

Q. You say that white lead was not used then?

A. No, there wasn't any used there.

Q. White lead is nothing more than thick paint, is it, Mr. Carr?

A. It's lead that's ground down and mixed with white paint—that's what it is—but it is put on there thick so when you fit the opening, it's good and solid.

Q. Don't you put white lead on with an ordinary brush, Mr. Carr?

A. No, you don't. [332]

Q. Or are you thinking of something else as white lead?

A. No, you use a putty knife. If anybody put in on with a brush, they don't know what they are doing, because it would be so thin it wouldn't do any good.

Q. Mr. Carr, in order to paint the beams with red lead, would they have had to put that on with a putty knife, too?

(Testimony of Burton E. Carr.)

A. No, they wouldn't have to put it on with a putty knife. That is still paint.

Q. White lead is paint, too, isn't it?

A. Yes, but it comes in a different thickness.

Q. Yesterday, Mr. Carr, you testified that the inside of the walls were rough. Is that a condition that exists all over the face of the inside walls?

A. Well, yes, if you look up the stairs in the showroom, you can see plenty of it right there and the parts room—it's all sticking out—you can break it off with your fingers, and you can see right through the block.

Q. How about the walls back in the shop?

A. That's just about the same thing—different places all over.

Q. In other words, it is all about the same?

A. Yes, it's all about the same.

Q. When was the touching up on the outside foundation done, Mr. Carr? Do you recall—the sacking that you described yesterday? [333]

A. Oh, that was done in the spring sometime—I wouldn't know the date. I can find out the date because when this guy that was supposed to do the sacking—he put a ladder on the neon sign and broke the neon sign—and we had to pay that—and we can look on the date of that, and they repaired it a few days afterwards.

Q. Was that this spring or last spring?

A. That was this spring. I am pretty positive that was this spring.

(Testimony of Burton E. Carr.)

Q. Was it done early in the spring, or during the warm weather?

A. Oh, it was done about the time I believe that he laid the lanes in the front of the gas pump. It was about that time, I believe.

Q. Yesterday you testified, Mr. Carr, that the specifications called for finishing both the restrooms. When you say both the restrooms, do you refer to the two in the front of the building, or to the locker room in the back?

A. I refer to both of them—the one in the ladies' restroom and in the men's restroom. The ladies' restroom is finished on the inside—I wouldn't say finished, because there is a hole there. I don't know what it is for, but some light, or something, is supposed to be in there, and it was never put in—and this place where they cut around this door, in fact, I pushed it off with my hand. They cut around that to put in that paneling, and that is the only [334] one that's near finished.

Q. The men's restroom, up in the front of the building, wasn't to be finished, was it?

A. No, the men's was just a rough job—just sewer lines and water lines—that's all that was supposed to be done, but the men's restroom in the back was supposed to be finished up—and it wasn't.

Q. The locker room?

A. You can call it a locker room.

Q. What plans and specifications required finishing material in the locker room?

(Testimony of Burton E. Carr.)

A. It was supposed to be finished in a workmanlike manner.

Q. Was it painted like the rest of the building on the inside?

A. They just painted the side. We painted the blocks ourself. He left the blocks rough.

Q. You testified yesterday that the chimney had to be torn down. Did Mr. Gothberg guarantee the chimney at the time it was laid?

A. Yes, he guaranteed it when it was laid. I knew it was going to have to be torn down—it was put up in a corkscrew way in the first place; also, the blocks we pulled out with our fingers and laid them back in there.

Q. Was the present chimney built in the exact location of the other chimney?

A. Yes. [335]

Q. Is the present one twisted around?

A. No, it is straight.

Q. It isn't twisted like the other one?

A. No. This one goes over like that—I would say maybe an inch out of line.

Q. Is the present one built with flue linings, also? A. Yes.

Q. Are those flue linings bent and twisted, too?

A. When they took those flues apart, I believe some was broken on account of the strain.

Q. Is there any material decrease in the efficiency of the chimney for the purpose for which it was built? A. I don't get your question.

Q. As a practical matter, Mr. Carr, will the

(Testimony of Burton E. Carr.)

chimney still handle the amount of gas, and soot, and smoke, that is put out by the furnace?

A. Well, it's the same size chimney all the way through, as it was in the first place.

Q. Does the furnace smoke, or anything?

A. Oh, no.

Q. In other words, the chimney is large enough, and constructed well enough, so it handles——

A. Yes, the first one did, too, but it would have fell over.

Q. How big is that so-called frozen place in the showroom, Mr. Carr? [336]

A. Oh, it's quite hard to answer that. There's several feet wide, and the length as you come in the door—I forget now—well, it can be seen easily enough—about three feet wide, maybe five or six feet long, as you come in the door on the right hand side—and that's all frozen—and then there is other places along the wall. Of course, they are covered up with paint, now, but this bad place is still rough even though there is six or seven coats of paint.

Q. Is that place that is frozen seven or eight feet long, and three feet wide, or smaller?

A. It would be all right there—in order to do a finish job they would have to come over there.

Q. Might it be even larger than the dimensions I have given you?

A. Underneath it could be larger—it could be much larger.

(Testimony of Burton E. Carr.)

Q. As a matter of fact, Mr. Carr, isn't it less than two feet in diameter?

A. Oh, I would say more than that—quite a bit more than that. Oh, yes, because it's about the full length of that window. You can see it.

Q. Yesterday you testified that the windows in the south wall of the building were all loose and rattling, did you not, Mr. Carr?

A. Yes, I did.

Q. Those are steel frames, are they not? [337]

A. Yes.

Q. Are they set on concrete blocks in the customary manner?

A. I wouldn't know if they are set in the customary manner or not, but I know they are loose all along the top and they put in putty in there to strengthen them.

Q. Can you see daylight around the window frames any place?

A. You did when they was first put up there.

Q. Can you now?

A. I haven't climbed up there for a long time. You can see light through most of the places in the blocks there.

Q. Is that above the concrete beam—the lintel above the window—or is it down below it?

A. Above the beam—and it's down below on the windows on the east side, I believe.

Q. Has the concrete beam, or the blocks, separated there? Is that what you are trying to describe?

A. Yes, it is separated.

(Testimony of Burton E. Carr.)

Q. Is there a crack in this block above the concrete beam and up to the roof?

A. Right in that place, I couldn't say.

Q. Well, Mr. Carr, there has been testimony here regarding a heater stove, the pipe of which is run out of the window. Now, that is located fairly close to the eight-by-eight door, isn't it?

A. Right next to it. [338]

Q. Ever since you moved into the building, have you had this stove in that location?

A. Well, we had it in the shop for a long time—and it is a stove that burns its own gas—I mean no smoke goes out of it. That is the reason they have it outside there. We was afraid there was carbon monoxide gas, so we let the smoke run outside.

Q. You testified, also, that daylight could be through some of the blocks. Now, where that situation exists, is it right over this heater?

A. No, that is in a different place altogether—quite away away from that heater.

Q. How far away from the heater?

A. Well, it is quite away up above—and then all along the 50 foot length, there are different places you can see daylight all through there.

Q. On the individual blocks, or just over the beam?

A. Yes, that whole thing—that sacking there that he put in evidently didn't have enough steel in it.

Q. Well, when you refer to daylight, then, the

(Testimony of Burton E. Carr.)

only daylight that can be seen is right over this beam, is that right?

A. You can see over the beam, but I don't remember just how many blocks was there.

Q. Now, on the exhaust pipe, Mr. Carr, that goes up through the roof, aren't the pipes and extensions the exact ones [339] that were put in there in the beginning?

A. The ones that are in there now?

Q. Yes.

A. Well, those wasn't put in there until this spring. I wanted Gothberg to put them in—I mentioned it dozens of different times, but he wouldn't put them in—and finally he come down with those homemade deals—but they didn't work satisfactorily. On the manufactured article, they have an electric motor on there, with kind of a vacuum to pull it out.

Q. Isn't it a fact, Mr. Carr, that those pieces were installed at the time when you went into the garage in February of 1951?

A. You mean installed?

Q. Yes.

A. They was not—they was not installed until this spring or toward this spring—rather close to spring.

Q. What is the condition, Mr. Carr, of the east wall?

A. Well, I never walked along there for quite some time. I couldn't tell you the condition now, but I know there is cracks on the inside.

(Testimony of Burton E. Carr.)

Q. That, again, is over the whole foundation?

A. The whole foundation, because frozen blocks were put in.

Q. Are the blocks now so loose they are about to fall out, or fall down, or anything? [340]

Mr. Carr: Do I have to answer?

Court: If you know. If you don't know, say no.

A. I haven't looked at the wall—in fact, I was down there just a couple of days ago. I was down there, and looked at part of the building—that was the first time since we sold out. I don't know the condition of the building today, so I don't know anything about it.

Q. What was the condition at the time you sold the building?

A. There was some cracks, but I don't know how many.

Q. Was the wall apparently in good structural condition?

A. I wouldn't say good structural condition, because a good mechanic wouldn't put that up that way.

Q. How about the south wall?

A. Well, we just got through on that south wall. You mean the one with the beam across, and you can see through it—and it was cracked? That is the same.

Q. Are the blocks there loose, and about to fall out, or still reasonably plumb, and in good condition?

(Testimony of Burton E. Carr.)

A. They would fall out if there wasn't something to hold them down.

Q. What do you mean?

A. Some of that mortar is cracked all the way around.

Q. Did you find some of the blocks cracked right through the middle, Mr. Carr?

A. Probably they do—you know, they won't stretch. [341]

Q. Is there any danger that that south wall is going to fall down?

A. If we had a little earthquake, I wouldn't want to be inside of it. I think it would fall down.

Q. You testified yesterday that one earthquake had shaken that building after it was built, didn't you?

A. Yes, and I noticed quite a few cracks in there, too.

Q. That earthquake didn't shake the walls down?

A. No.

Q. How about the west wall that runs along the property line?

A. That is the one I said it had been a long time since I saw that wall. From the inside, and looking out, I could see light in different places.

Q. I thought we were talking about the east wall at that time. Mr. Carr, why did you wait until the 6th day of May, 1952, to make demand upon Mr. Gothberg to do all this work to restore the condition of the building?

A. You mean to do all this extra work?

(Testimony of Burton E. Carr.)

Q. Yes, that is, the date you served this demand on him, isn't it?

A. You mean the date?

Q. Yes, that was May 6th, 1952?

A. May 6th, 1952?

Q. Yes. A. Could I see it? [342]

Q. Is that notice of demand to meet the terms of contract?

A. Yes, that is the demand to meet the contract.

Q. Why did you wait until May of 1952 to make such a demand, Mr. Carr?

A. I had been after him to finish it up, and he called my residence up the day before we got the jury in here, and wanted to make a settlement. He didn't want to go through court.

Q. Did you say you would pay him \$4,000.00, approximately, or did you say, "I will pay you for the extras, too?"

Mr. Bell: I would object to that.

Court: Negotiations for settlement after suit is brought—

Mr. Arnell: If your Honor please, I wasn't asking him about the negotiations. He made some reference to an attempt to negotiate, or something—

Court: I understood counsel, or the witness, to refer to something that was said after the suit was brought—some negotiations concerning a possible settlement of the suit. Such negotiations are not admissible, and even though not objected to, I think the Court should enforce the law in that respect.

Mr. Arnell: I realize that, your Honor. It wasn't

(Testimony of Burton E. Carr.)

my intent to bring out the matter of negotiations.

Court: That answer will be stricken, and the jury will be instructed to disregard where he says he—I assume the plaintiff— [343] called him at his residence and said he wanted to make a settlement. Negotiations after suit is brought are not admissible for the very good reason that men wanting to avoid litigation will waive what they conceive to be their true rights and settle for little, if anything, of what they think is justly due them, so no man should be penalized because he wants to avoid litigation or actual trial of the lawsuit. The question here was why the witness waited until May 6th to serve this notice. Now, he can tell why he waited until May 6th to serve the notice, if he desires to.

Mr. Bell: Your Honor, I believe that as part of his answer he said he kept after him—tried to get him to fix the job.

Court: The reporter will read the last answer.

Reporter: “I had been after him to finish it up, and he called my residence up the day before we got the jury in here, and wanted to make a settlement. He didn’t want to go through court.”

Mr. Bell: I think that answers the question.

Q. Mr. Carr, was this demand made before, or after, you sold the building?

A. What demand?

Q. The one you have before you.

A. This was made after we sold the building.

(Testimony of Burton E. Carr.)

Q. And also after the suit was started, was it not? [344]

A. Yes, after the suit was started.

Q. Now, when you testified you had been after Mr. Gothberg and told him that if he would do certain things you would pay him, did you indicate you would pay him \$4,000.00, or did you indicate you would pay him, also, for the extras?

A. I told him I wanted the building completed the way it should be—and when it was completed, we would pay him.

Q. Did you specify the amount?

A. Naturally we would have paid him if everything was complete and done according to specifications.

Q. You would have paid him all of these extras, too, would you?

A. I would have paid him what we agreed to.

Q. Do you mean the \$4,000.00 on the contract only, or do you mean you would have paid him in addition to that for the extras?

A. It would have been less the amount of that \$25.00 a day penalty for not having it completed by December the 1st.

Q. Mr. Carr, was not the time of completion extended, with your knowledge and consent?

A. No, it wasn't.

Q. Did you raise any objection, during the course of construction, that it was not being completed on time?

A. The reason it was not completed on time—

(Testimony of Burton E. Carr.)

he didn't have [345] any heat in the building so the men could work.

Court: Just answer the question.

A. We talked to him a number of times on the completion date.

Q. Did you object, though, Mr. Carr?

A. What do you mean by object?

Mr. Arnell: That is all—no further questions.

Court: Any further direct examination?

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, I hand you your exhibit that was introduced yesterday.

Court: The schedule has again been changed for the afternoon, and this case will continue on trial until 4:20 this afternoon. Then we must suspend to take up another case. We are about to take a recess, and ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty, and the Court will now stand in recess for 10 minutes.

Whereupon, the Court recessed from 2:57 o'clock, p.m., until 3:07 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury to be present. Counsel for defendant may proceed with examination.

Q. Mr. Carr, Mr. Arnell asked you about these two extra walls that were—I presume by the way Mr. Arnell explained it— [346] one would be the north wall and the other the east wall in the boiler

(Testimony of Burton E. Carr.)

room. Did you understand those to be the two walls he inquired about?

A. Yes.

Q. When were they built?

A. They were built the same time the foundation was moved back.

Q. Now, have you considered what would be a fair charge for the building of those two walls built at the same time the other part of the foundation was built?

Mr. Arnell: We wish to interpose an objection because Mr. Carr, throughout the entire case, has said he didn't know anything about construction, so I don't think he is qualified to evaluate the cost.

Court: Overruled.

Q. That one wall, eight-by-twelve, and the other wall, eight-by-eight feet, what would be a fair cost of building those walls, in your opinion?

A. The forms on the outer walls have to be in there, anyway, and they are eight feet deep, so there wouldn't be any extra, except a little extra concrete—but those other two walls—I thought about Thirteen or Fourteen Dollars a yard. I don't know what the cost for that concrete is, but I imagine around \$250.00 for the whole deal, figuring what it would cost from the new foundation by setting one [347] back and the other back—in that proportion it would be about \$250.00 for the amount of concrete, figured on a percentage.

Q. Mr. Arnell asked you a question about how much the City offered to pay you for moving your

(Testimony of Burton E. Carr.)

building back. I believe you stated something there.

A. \$1,310.00.

Q. Did that include the ten or twelve feet of the front of your lot? A. Yes.

Q. And that is all that you have been offered so far?

A. That is all they would pay on that, because they said they could move the foundation back—that I could get it moved at that cost, and that was including the price of the property on the front.

Q. That would be \$1,310.00 for the front portion of your lot, plus the extra cost that they had caused by forcing you to move it back? A. Yes.

Q. Now, for what you paid the Husky Furniture Company for doing the walls in the showroom and other places, and such work as that that they did for you, you never charged that back to Mr. Gothberg, did you? You paid that yourself?

A. Yes, I believe I have a check in my book here.

Court: Just answer the question. [348]

Mr. Carr: Yes, I paid it.

Q. Did you charge it to Mr. Gothberg?

A. No.

Q. May I see that check?

A. That is for finishing work in the showroom.

Q. I hand you this instrument, dated February 26th, 1951, No. 1722, and ask you to state if that was the amount and the check that you paid Husky Construction Company for finishing the inside of the showroom and the offices in there?

A. That is correct.

(Testimony of Burton E. Carr.)

Q. And did you pay them any more than that, or is that the total amount?

A. That is the total amount.

Q. What did that cover?

A. It covered all the finishing work in the offices, and the showroom, and the labor and the material.

Mr. Bell: We offer it in evidence.

Mr. Arnell: We object to it, your Honor, on the grounds that it is immaterial. The witness has already stated he didn't attempt to charge it back to Mr. Gothberg. It is not a proper issue in this case. It is not raised by the pleadings.

Court: Overruled: It may be admitted.

Clerk: Defendant's Exhibit L.

Mr. Bell then read Defendant's Exhibit L to the jury. [349]

Q. Now, did you pay out any other money for finishing of that showroom and offices in there to anybody else other than Mr. Gothberg?

A. Yes, we had the painters in there working in there—putting on finishing work—I mean clear varnish.

Q. Do you know how much you paid them, or do you have a check with you?

A. I don't have the check with me. It would take quite awhile to look it up.

Q. Did they work there one day or several days?

A. A couple or three days.

Q. Now, the ceiling that is put on in there—does the ceiling cover the entire building, or only the showroom part?

A. Just the showroom.

(Testimony of Burton E. Carr.)

Q. How big a space does that cover, approximately?

A. Let's see. It's about 48 feet on the inside measurement, and then that angle taken off there—and then there's about 24—let's see—about 24 feet—showroom and office.

Q. So it would be about 24 feet by 48 feet, less the corner that's cut off? A. Yes.

Q. Did you pay for the material that was used in putting on that ceiling?

A. Yes, I paid for the block. We have something similar to this—it's got holes in it. We paid for all that ourselves. [350] We had it come up by air.

Q. Who put this up for you?

A. Mr. Gothberg.

Q. And now, who bought the fire board that was used in the partition?

A. I bought that myself.

Q. And Mr. Gothberg put that up for you, did he not? A. Yes.

Q. Now, was the fire wall—the cinder block wall—

A. That was the one that they was supposed to put up, but he led me to believe I was supposed to pay for that—that is the reason I put wood, because he said it would be cheaper.

Q. That was the reason that you went to wood and fire board instead of cinder blocks?

A. Yes.

Q. Now, I call you attention to testimony about

(Testimony of Burton E. Carr.)

the front foundation wall. Mr. Arnell asked you about the settling there. Do you know how deep that wall was actually put in the ground on the front?

A. The original one was—they put it in six feet because the city inspector checked the ground formation, and he made me put it down six feet—that was a City ordinance.

Q. That was the whole wall?

A. Yes, it's probably the same now. [351]

Q. Now, then, Mr. Gothberg put down the second wall in front. How deep did he go with that?

A. He claims three feet, but it couldn't have been three feet, because I dug down about a foot and a half, underneath, when I was inspecting that crack. That is all the farther it was, but he should have put it down three feet from the level of the grade—but he was probably counting from the top, sticking out of the earth.

Court: This subject was pretty thoroughly covered on direct examination.

Mr. Bell: That's right, your Honor, but Mr. Arnell went into it, and I thought he left the matter just a little confusing.

Court: Go ahead.

Q. Are you familiar with the specification that provides that if the City Building Code and the specifications vary, that the Building Code should prevail? A. Yes.

Mr. Arnell: I wish to interpose an objection. That calls for the conclusion of the witness. I don't

(Testimony of Burton E. Carr:)

think he is qualified to make such a statement—
Mr. Bell asking which would prevail.

Court: Is it in the specifications?

Mr. Bell: Yes, your Honor, I thought he could tell me where it was and save time. [352]

Court: If it is in the specifications, it is proper to call the jury's attention to it.

Mr. Arnell: The plans impose the burden upon the contract, irrespective of what any ordinance said. If the architect, or Mr. Carr, made a mistake in putting out the plans, that burden can't be placed upon the contractor. He is bound by what the plans call for.

Mr. Bell: The specifications specifically provide—the one initialed by Mr. Gothberg—provide that:

Court: If that be true, Mr. Gothberg, I think, is bound by the specifications.

Mr. Arnell: I think the best evidence is what the ordinances might provide—not Mr. Carr's opinion.

Mr. Bell: I am laying the foundation.

Court: First we must know what the specifications show, not Mr. Carr's opinion.

Mr. Bell: The only reason I asked that question, I thought maybe he could tell me the page of it to save me time.

Court: If it is on any page——

Miss Wise: Your Honor, this morning I assumed that this jury would be released at 3:30 and I made an appointment. I wonder if I could have a call made for me?

(Testimony of Burton E. Carr.)

Court: Yes, if it is a very serious commitment, like seeing a doctor or dentist.

Miss Wise: I don't want to go. I just want a call to be [353] made.

Court: We will suspend and you may make the call, now, while counsel is looking this up. You may go through this door into my room and come back the same way.

Mr. Arnell: May I go into the library just a few minutes, your Honor?

Court: Yes.

Whereupon, Mr. Arnell and Miss Wise left the courtroom and returned.

Court: The trial may resume now. Counsel may proceed.

Q. Mr. Carr, SC9, Building Code, under the specification here, we find these words: "The City of Anchorage Building Codes are a part of this specification. If there is a discrepancy between the specification and the City Code the City Code shall govern." Now, did the city engineer give you specifications, or the inspectors give you specifications, and require a certain depth wall for your building?

A. Yes.

Mr. Arnell: I wish to interpose an objection, because this is the best evidence.

Court: The objection is sustained. The Code may be proof.

Mr. Bell: All right. Exception.

Q. Mr. Arnell asked you about a deposition. Who took that [354] deposition, Mr. Carr?

(Testimony of Burton E. Carr.)

A. This lady here.

Q. And who was the attorney that did the questioning of you on that deposition?

A. I think Mr. Plummer.

Q. Mr. Plummer, was it, or was it Mr. Arnell, do you remember?

A. Mr. Arnell. I get them mixed up.

Q. And that deposition was taken by them, was it? A. Yes.

Q. I see. Now, on this sign post that is referred to, do you know how much was charged to you in that bill. I hand you an itemized statement of January 13, 1951, and ask you to state if that sign post is included in there?

A. Yes, it is.

Q. And will you read the parts that are charged to you there?

A. Extra for sign post pipes, \$18.60; let's see—extra for sign post, and underneath it says pipe, \$18.60—and then another pipe is \$1.23, and plate, \$11.60. I don't know what that plate is for.

Q. Now, have you ever disputed that that was an extra, or is it an extra?

A. It is an extra there but—just a moment—no, that's all right—the charge on there would be all right.

Q. Mr. Carr, Mr. Arnell, while inquiring of you, said something about the building next door to yours. How close [355] is that to your building?

A. That is where I live. It's just a lot over from where I live—just on the next street. It is on

(Testimony of Burton E. Carr.)

Fourth Avenue—the one I was mentioning. That is the Laird Paint Store there.

Court: You said next to the Church of the Open Door?

Mr. Carr: Yes.

Q. Is that as tall a building as yours?

A. The same height and 20 feet longer.

Q. The same width?

A. No, it's 25 feet shorter—ours is 50.

Q. Did you examine the walls recently?

A. I examined them this morning.

Q. Is it an older building than yours?

A. Yes, two or three years old.

Q. Was the block laid on that building with heat and canvas over it?

A. Yes, it was laid with canvas and heat.

Q. Can you clearly distinguish the difference of the quality of the wall in that building and that in yours?

A. It is a much finer job. There's only one crack. You have to go real close in order to see it. It's just a short one but that's on the west wall towards the Bay.

Q. Now, in interrogating you by Mr. Arnell, something was said about the structural steel on the site. Now, does [356] the structural steel that was there then and was later erected—that was bought by you outside and shipped up here—was there any part of the marquee in that?

A. No, it wasn't supposed to be.

(Testimony of Burton E. Carr.)

Q. The marquee was in the contract taken by Mr. Gothberg?

A. Yes, the contract for building the building.

Q. Yes, and anything in relation to the marquee, is it your contention that Mr. Gothberg agreed to furnish it, by the written contract and specifications? A. Right.

Q. GC-10, of the specifications, provide for the cleaning up after the work was done. Was that ever done?

A. No, we had to clean that up on the side—and he left a pile of gravel in the back—and I guess that was moved out here awhile back. We moved some of it, but we didn't get it all moved.

Q. How much did it cost you to do the cleaning up down there, approximately?

A. Well, we did it with our own labor, so I don't know—it took about four or five hours for the whole crew. We carried a crew of about 11 when we was operating.

Q. An 11 man crew four or five hours. What was the average wage that you paid those people?

A. They made around \$2.00 and up to \$3.25.

Q. Would \$2.50 or \$2.75 be an average for the labor there? [357]

A. Oh, golly, no. The mechanics were drawing more than the others.

Q. What would you estimate the average to be?

A. Maybe \$2.85 average, I would say.

Q. And there were 11 of you—and four to five hours?

(Testimony of Burton E. Carr.)

A. I believe there was around about 11 at that time.

Q. Do you figure, Mr. Carr, that that would be \$125.40 for that, approximately. Can you figure it?

A. It would run similar.

Q. I see. Now, Mr. Arnell asked you a lot about the connecting of the washmobile, and concerning the check that you paid for \$175.00, and the bill that he presented was \$170.55. Do you know where the difference of \$5.00 came from?

A. I have no idea where that difference is.

Q. You did pay the \$175.00 check that you introduced in evidence?

A. Yes. I can look that bill up and bring it down in the morning.

Q. Did you say there was less expense and less pipe used to connect up the washmobile when it was moved to the present designation than it would if it were left in the place mentioned in the drawing?

A. Yes, it would cost less.

Q. Now, the air lines to the compressor. Did the specifications [358] provide that those air lines go to the filling station portion of the building in the vicinity where the pump islands were? Do you remember whether the specifications provided that the air lines should go there?

A. That's something I don't remember. I know there was supposed to be two designated points. I believe one, I know, to the lube rack, and either it was supposed to go to the washmobile or the other place—I can't recall without reading it.

(Testimony of Burton E. Carr.)

Q. If the specifications provide that the air lines should be connected to that portion of the building where the pump islands are, for the purpose of filling tires with air, would that require the same pipe to put in there, as provided in the specifications, than was actually used the way you put it in?

A. It would have been a lot cheaper for me if it had been that way, I know, because that was on the other side of the building, and it would have only taken about 20 feet of pipe to do what I wanted to do. I am not so sure if it was supposed to be in that place or not.

Q. I won't take that up now, but I will in the argument. There has been considerable testimony about the use of the plate glass in lieu of a door in the northwest wall—two plate glass. Is there two of those plate glass in that angle wall, or one? [359]

A. There was two—supposed to be in—and we put in two more extra ones.

Q. So there's four in?

A. There's four in now.

Q. How large are those plate glass?

A. Four-by-seven, I believe.

Q. Four feet wide and seven feet high?

A. I believe four—I know seven feet high.

Q. As I understand, there's two more of those glass in there than was originally contracted to be put in?

A. Yes.

Q. In lieu of that, the concrete blocks, or cinder

(Testimony of Burton E. Carr.)

blocks, that would have filled the hole, have been taken away? A. Yes.

Q. What about the north wall—the point that extends directly parallel with Fifth Avenue—was that glass to start with, or was that changed?

A. No, that's glass to start with.

Q. Has there been any particular change made that was ordered by you in that wall?

A. Yes, there was. The glass was just a little taller, was all.

Q. How much taller?

A. I believe six inches is all the difference—I believe that's what it was. [360]

Q. Now, Mr. Carr, did you ever see, or did Mr. Gothberg ever furnish you, the bill for the extra that he claims to have used in that concrete slab over the windows, and the three concrete pillars that were put in in that northwest diagonal wall? Did he ever furnish you a bill?

A. No. I notice here 185 pounds, but I never seen any bill.

Q. Do you know if he used any steel whatever in it or not? A. No, I didn't look to see.

Q. And you couldn't tell, now, could you?

A. No, because it's covered up.

Q. You refer to a 12 by 12 door, in which Mr. Gothberg claims a substantial sum for taking out an iron beam for the hanging of that 12 by 12 door. Now, if the door had come, that you had requested, would it have been necessary to remove that beam?

(Testimony of Burton E. Carr.)

A. No, it would not have been necessary.

Q. As I understand your position, the reason for having to move that beam was Mr. Gothberg's not furnishing the door that was originally ordered for the place?

A. That is right.

Q. I see. Now, Mr. Arnell asked you if that strut boards that was used in that concrete, were not set with an instrument. Did you see any kind of surveyor instruments used there in setting those boards?

A. You mean that form that goes around——

Q. The 25-foot slab places.

A. Yes.

Q. Did you see any instrument used in setting those?

A. No, I didn't see any instrument used, unless he used an instrument when I wasn't there.

Q. Were you there most of the day that they were putting in these forms to pour this concrete?

A. Most of the time I was there, because I was anxious to get in the building—I was paying such high rent for it.

Q. Now, the specifications provide—Roman Numeral I-07: "Concrete slab finishes shall conform to the following requirements: Monolithic finish; trowel too hard, dense surfaces, free from trowel marks; slope to drains, true to line, evenly graded, 3/16ths inch per foot, unless otherwise noted." Did you ever order it to be changed in any way?

A. No.

Q. Was it put in that way?

(Testimony of Burton E. Carr.)

A. I don't think so—if it had, it would have drained.

Court: What page is that on, Counselor?

Mr. Bell: It is at the bottom of page marked Roman Numeral I-3.

Q. Mr. Carr, I want to ask you whether or not, when laying the concrete, if this was done: "Protect fresh concrete from direct rays of sun, drying winds and wash by rain, [362] protect from all disturbance until thoroughly hardened. Heat concrete to from 50 to 60 degrees F., when air is below 40 degrees F. Keep concrete above 50 degrees F. for four days after pouring. Do not allow to freeze until thoroughly hardened." Was that done there in laying that concrete?

A. Well, at that time, when he got the last of the concrete in, he had plenty of heat—but for some reason or other, they didn't have windows in front—and he had a canvas around there with boards stuck up—and the wind blew those down and that caused the concrete floor to freeze in the showroom. But the only place it froze in the shop was where the big door was. He didn't have the big door up when he laid the concrete. He had a canvas there, and he took that out and it crumbled right out—he did replace it by the big door in the shop—you can see it.

Q. Do you know how much money you paid for him, other than the \$34,672.50? Do you remember how much more you paid to him, or for him?

(Testimony of Burton E. Carr.)

Mr. Arnell: We wish to object to this as beyond the scope of redirect examination. There was no contention of Mr. Carr, in his direct, that he paid any money for Mr. Gothberg.

Mr. Bell: He testified paying that \$175.00 for him because they wouldn't do the work unless he agreed to pay.

Mr. Arnell: He said he ordered the work done, and the [363] evidence shows he ordered it done, and he himself couldn't testify whether it was within the contract or without. As a matter of fact, he included in one of the bills some work that had been done at his home.

Mr. Bell: He did not.

Court: It is not proper redirect, but rather than have injustice done, I would permit it, and then counsel for plaintiff can examine into it later.

Q. I want to ask him now, since Mr. Arnell said he admitted that he owed for connecting the washmobile—Mr. Carr, did you testify this morning that that was a proper charge, or extra charge, for connecting the washmobile?

A. No, I told Mr. Gothberg several times I wanted him to hook that up and they finally hooked the pipes—so they finally hooked the pipes and they hooked the wrong pipe. They had all these pipes in the same place, and he wouldn't do anything about it—so I went up there to Anchorage Installation and they said they would go ahead and do it. And they took all the pipe coverings off, and after they got all the pipe out, and it was laying

(Testimony of Burton E. Carr.)

on the floor, he said he wanted me to sign the work order—and I said, “What is that for?” and he said that’s on extra work here—so we was going to open in a few days and I had to have it connected, and I knew I couldn’t get any other plumber—so I was forced, on protest, to sign it—but he didn’t tell me [364] how much it was going to cost at the time.

Q. Did you pay that later?

A. Yes.

Q. Do you consider that as your indebtedness, or is that one of the contentions by you here that you had to pay it, and that it should have been paid by Mr. Gothberg?

A. Yes, and the pipes were never recovered.

Q. Were they ever, up to this time, recovered?

A. Some of them—not to this time.

Court: What was the amount paid?

Mr. Carr: \$175.00.

Court: What exhibit is that?

Clerk: E.

Q. Is this the check that you paid to them for that?

A. This is the check I paid, but it wasn’t this one that he showed—it was another bill—that was \$170.00. There was some bill—\$170.00—I would like to look up the actual bill and see just what this was for.

Mr. Bell: There was another exhibit.

Mr. Arnell: Exhibit 11 or 12.

Court: 12 is an order for the washmobile.

(Testimony of Burton E. Carr.)

Q. I hand you Plaintiff's Exhibit 12, and ask you if this is the statement you asked for?

A. Yes, that is the one I asked for. I don't know—I don't understand it unless there is something added on to it— [365] this is marked \$170.55, and it looks like it was made in the last day or so. I don't know exactly what it is.

Q. The amount you paid was \$175.98?

A. Yes, this is a work order—this isn't a bill.

Q. I wanted to ask you about the cost of fixing this neon sign that was broken by one of his employees.

A. I don't remember what that is now—but we have the bill over there.

Q. Do you have the bill here in the courtroom?

A. I think so—I am pretty sure it would be over there, or else it's at home.

Q. What sign company fixed it—do you know?

A. I believe that was Alaska Neon.

Q. I will come back to that. Now, Mr. Arnell asked you if you didn't know that white lead was just a paint that you use with a paint brush. Do you know what white lead is?

A. I have done quite a little painting and automobile painting, but it is a putty you use for putting in between those door jambs—a white lead putty.

Q. Is that a semi-thick substance?

A. Yes, you put it on with a putty knife. It's heavy.

Mr. Bell: I think that's all.

(Testimony of Burton E. Carr.)

Court: Counsel for plaintiff may examine. [366]

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, what's the size of the boiler room—outside dimensions?

A. I couldn't tell you that right now. I wouldn't have the least idea.

Q. If the plans said 17 by 14 feet, would that be right? A. No, I don't think so.

Q. How deep is the excavation below the surface of the ground?

A. It looks like it's about eight feet inside.

Q. The excavation, itself, is down below that?

A. Oh, yes.

Q. Is this \$250.00 figure you gave us what you would like to pay, or is that an estimate of the cost?

A. Well, he asked me just what I thought, and I just give him an estimate. Now, I may be off on that—it was just an estimate. It may be quite a bit less or quite a bit more.

Q. Do you mean to tell the jury you can get a 17 by 14 basement, plus the boiler room and stairs for \$250.00?

Mr. Bell: I never asked him about a 17 by 14 boiler room because I never thought there was a boiler room.

Mr. Arnell: It is on the plans, Mr. Bell.

Court: The 17 by 14 may be left out of the question. He hasn't admitted that the specifications provide for a 17 by 14 boiler room. The specifica-

(Testimony of Burton E. Carr.)

tions are in evidence, and counsel can argue it to the jury.

Q. Mr. Carr, did you testify the City had agreed it would cost [367] you \$1,300.00 to move the building back?

A. Well, the way the City agreed to it—we appointed a man and the City appointed a man—and the two of them appointed one, and they decided what it would cost to move the building back was \$1,310.00, including the land.

Court: The City would take twelve feet of land, and that was all included in the \$1,310.00?

Mr. Carr: That's what they offered me.

Q. You mean the City offered to pay you that recently, is that right? A. Yes.

Q. And you refused it, did you not?

A. I was out of town at the time.

Q. What, Mr. Carr, did you ask the City for in the first place?

A. I don't know if there was any price. I believe we mentioned about what Mr. Gothberg charged us for it. I am not sure, though.

Q. Approximately \$4,000.00, plus the value of the land?

A. I couldn't say for sure. It seems as though we talked about it previously.

Q. Did you ask them \$12,000.00 for the value of the land, and the loss of the work that you had already invested?

A. Would you ask that question again?

Q. Did you ask them as much as \$10,000.00 for

(Testimony of Burton E. Carr.)

the loss of the [368] land, and the value of the building you had already put up?

A. No, there was quite a little charge more than that, I believe, for the simple reason they kept me from building. They had been offering me to build this place for a year, and I was paying my rent for about a year and five months.

Q. You asked for more than \$10,000.00, is that right? A. For what damage it was doing.

Q. Now, Mr. Carr, were these plans and specifications, which are in evidence here, submitted to the City for their approval?

A. I don't remember. You will have to ask Mr. Bell.

Q. You did get a building permit from the City based upon these plans and specifications?

A. Oh, yes.

Q. Is there any steel in the marquee, as such, Mr. Carr? A. Any steel in the marquee?

Q. In the marquee construction itself?

A. Well, I know there is steel there, but I don't know just how much.

Q. Where is the steel in the marquee?

A. It is right there in the building at Fifth and Denali.

Q. Are you talking about the steel beam that is at the inside end of the marquee?

A. Well, there is steel there, and there is a steel pipe that [369] goes through there on the sign—and another steel there that holds up a piece of timber—and quite a bit of steel in different places.

(Testimony of Burton E. Carr.)

Q. Is that the steel you contend Mr. Gothberg should furnish? A. That's part of it.

Q. Did that sign have any effect on either of the steel beams, Mr. Carr?

A. Any effect? I don't know just how that is hooked up.

Q. Is it not a fact, Mr. Carr, that one of the beams had to be reinforced because the heavy sign post was attached to it?

A. That is some of that material that was on the sign post that we paid Mr. Gothberg for already.

Q. You mean the extra material on the sign post was used to reinforce that beam?

A. The sign post and the material which reinforced that—that has already been taken care of—it's been paid for.

Q. When?

A. By check there. On one of those large checks, because it's marked right on there.

Q. Was that all that was necessary, Mr. Carr, to use in connection with reinforcing this one beam that I am talking about?

A. I wouldn't know about that. The only thing I know I furnished so much steel, and he was to furnish the rest [370] of the material and steel to build the building.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): I found this neon sign deal. I hand you a statement from Alaska Neon Engi-

(Testimony of Burton E. Carr.)

neering Company, and ask you to state if that is the bill that was occasioned by reason of the defendant's employee breaking the sign there?

A. Yes.

Q. Did you pay that? A. Yes, we did.

Q. How much?

A. \$18.00.

Mr. Bell: I offer the statement in evidence.

Mr. Arnell: May I ask a question, your Honor?

Court: If it has bearing upon the admissibility of the document.

Recross Examination

Q. (By Mr. Arnell): When was the finishing work done that resulted in this particular damage, Mr. Carr? I believe you testified earlier it was in the spring of this year.

A. The spring of the year, yes.

Q. As I recall your testimony, Mr. Carr, you said that that sacking and the finishing work outside was done in the [371] spring of this year?

A. I believe it was.

Q. And it was when that fellow was doing this work that this was broken?

A. Whenever he was sacking—it was when this steel come. You can check that in your own records.

Mr. Arnell: No objection.

Court: It may be admitted and marked Defendant's Exhibit M and may be read.

Mr. Bell then read Defendant's Exhibit M to the jury.

(Testimony of Burton E. Carr.)

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, about what date did you sell your business, and everything, down there?

A. March the 1st.

Q. Of this year?

A. Of this year, yes.

Q. So then the sacking was done last year?

A. Evidently it was last year, yes.

Q. Now, Mr. Arnell asked you if you did not agree, or did not waive any objections to the time that your building was being done——

Mr. Arnell: If your Honor please, I didn't make any such statement. I asked him if he objected. I think Mr. Bell should recall that phraseology. [372]

Mr. Bell: I will agree.

Mr. Arnell: Don't misquote me.

Mr. Bell: I didn't intend to, Ed.

Q. Mr. Arnell asked you if you made any objections to the time the building was being finished?

A. Yes, I made quite a few objections on account of I wanted to get in there as quick as I could.

Q. I will ask you to state whether or not you were paying rent on another building at that time?

A. \$600.00 a month.

Q. Where was that building?

A. Fifth and East "H."

Q. And did you pay rent on that building from December 1st, 1950, until you moved out of that building?

A. Yes, I had to move out the 15th.

(Testimony of Burton E. Carr.)

Q. Do you remember about the date you moved out of the building?

A. February 15th—I had to vacate then.

Q. Then did you pay December, January and half of February rent? A. Yes.

Q. And that would be \$1,500.00, is that right?

A. Yes, that would be about right.

Q. Did you have any other losses by reason of not being able to get into your building? [373]

A. Well, the big loss was waiting after we did get in the building—the big loss was getting our stuff in there. If the building had been ready, we would have been able to work the men and mechanics, but we had to pay the mechanics in order to hold them. And then loss of time when the building was not completed—the door was not up—there was just a canvas on the door—the door was up but not working.

Q. Could you put your whole crew to work after you moved in on the 15th?

A. No, we couldn't do any work at all.

Mr. Bell: That's all.

Recross Examination

Q. (By Mr. Arnell): Mr. Bell has asked you, Mr. Carr, when you went into possession. Now, I will ask the question a little differently. When was the completion required under this \$38,000.00 contract? A. Well, it isn't finished yet.

Q. Well, I mean substantially completed, except for the extra work, so that you could have moved in.

(Testimony of Burton E. Carr.)

A. Well, I really couldn't have moved in because I couldn't get my parts department, and parts bins, and stuff in there. The carpenters was building that straight wall and putting those other walls in. [374]

Q. Was that part of the work that was done by Husky Furniture?

A. Part by Husky Furniture—and part on the \$38,000.00 contract—and part for the extra work. But that could have been done quite sometime before that, while they was waiting around there.

Q. Was the work that was being done on the parts room and the show room part of the original \$38,000.00 contract?

A. That one wall was.

Q. Do you mean they were just putting in the partition at that time?

A. They had to put in the partition before they could do the rest of it.

Q. As a matter of fact, wasn't that work done on or about January 13th of 1951, Mr. Carr?

A. You mean on the show room in back?

Q. No, I mean the work that was required under the \$38,000.00 contract.

A. No, he didn't have all of his work complete, because he didn't even have the door up there—he just had a canvas over the big door, and we couldn't leave anything in there.

Q. I thought you said, a little while ago, Mr. Carr, that at the time the floor was poured, he had plenty of heat in there.

(Testimony of Burton E. Carr.)

A. He had a canvas when the floor was poured. He had heat from the furnace room, but the canvas was covered over, [375] and we couldn't move our stuff in.

Q. I have no further examination questions, but do you have the documents that you agreed this morning you would produce this afternoon, regarding the delivery of the hoist and pumps, and all those things ?

A. Yes, partially—that's the reason it made me late.

Q. May I see those, please?

A. Yes, they arrived on the Alaska Railroad—and on December—it looks like the 15th—for the lift, and the air compressor arrived in Anchorage December the 4th—that is the same bill there—when it is marked paid is when I picked them up—they were all hauled at the same times.

Q. When you say they are marked paid, that is the date you picked them up? A. Yes.

Q. You then picked the hoist up from the Alaska Railroad, and hauled it to the garage?

A. Yes.

Q. And the same on the compressor?

A. Yes, but they were there previously.

Q. Both shipments, though, Mr. Carr, were consigned to you, were they not—Mr. Burton E. Carr?

A. Oh, yes, both consigned to me.

Q. And you picked up the various items that are represented on the date stamped "paid" on each of them, is that [376] correct? A. Yes.

(Testimony of Burton E. Carr.)

Mr. Bell: I have no objection to their being introduced.

Mr. Arnell: I shall offer them now.

Court: They may be admitted, and appropriately marked.

Clerk: Plaintiff's Exhibits 14 and 15.

Court: Which is 14? What does that relate to?

Clerk: The compressor.

Court: And 15 to the hoist?

Clerk: Yes. It's called an auto lift.

Mr. Arnell: Mr. Bell, do you desire the exhibits be read, or will you waive that.

Mr. Bell: I would like them read, including the date of shipment, please.

Court: Just read the dates and the stamps put on, received, and so on.

Mr. Arnell then read the exhibits to the jury.

Court: We will suspend the trial now, until next Monday morning at 10:00 o'clock. The jurors will remember the admonition of the Court as to duty. You are now excused, to report next Monday morning at 10:00 o'clock.

Whereupon at 4:20 o'clock, p.m., September 25, 1952, the trial of the above entitled cause was continued until 2:00 o'clock, p.m., September 29, 1952.

Be It Further Remembered, That at 2:00 o'clock, p.m., [377] September 29, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties

(Testimony of Burton E. Carr.)

being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: I think Mr. Carr was on the stand when we closed. He may resume the witness stand. My notes show that counsel for defendant was pursuing redirect examination.

Mr. Bell: I think that's right, your Honor—that is the way I remember it.

Mr. Arnell: As I recall, your Honor, I had finished.

Court: Yes, it was on redirect.

Redirect Examination

Q. (By Mr. Bell): Mr. Carr, I hand you a paper—a statement from Husky Construction Company. I will ask you to examine that and state whether or not that is a statement of the work they furnished there?

A. Yes, there is \$1,434.90. It's plyboard, and all the finishing work inside the garage, in the show room, and all the offices—that was all the material in the whole thing. And the labor was \$1,290.50—and that included installing all the plyboard, and all the white birch all the way around the building, inside the offices and outside, and included [378] all the counters—all the glass counters—and all the glass blocks underneath—and the whole works. That's \$1,290.50.

Q. That \$1,290.50 was for labor? A. Yes.

(Testimony of Burton E. Carr.)

Q. Is this statement representing all the work the Husky people did for you at that place?

A. All the work, yes.

Mr. Bell: I offer it in evidence.

Mr. Arnell: We make the same objection, your Honor, that we made to the admission of the check.

Court: What was the objection?

Mr. Arnell: That it was immaterial and irrelevant.

Court: Why?

Mr. Arnell: Because this is extra work, beyond the scope of any of the contract. Mr. Carr has testified it was extra work done by the Husky Furniture Company.

Court: What has that to do with the case, Counsel?

Mr. Bell: We want to show who really did the finishing.

Court: Well, the contract didn't provide that the plaintiff should finish the building.

Mr. Bell: No, it did not. But one of these causes of action is extra—over \$5,000.00 for finishing the office and building inside, and this is to show who really did do the work. [379]

Court: Is it your claim, Mr. Carr, that this is work that Mr. Gothberg contracted to do under his contract?

Mr. Carr: No, this is not under the contract, but it was a difference between—his labor was so much higher—just for this rough work—and this is finished work. Mr. Gothberg just botched it in

(Testimony of Burton E. Carr.)

with two-by-four's, and there was a \$5,000.00 bill on that—and where this was all finished carpentry work, which is much harder work, that is the reason we brought that up.

Court: I don't think it is admissible or relevant.

Mr. Bell: Your Honor, you would be absolutely right, if it wasn't for this reason: If Mr. Gothberg claims \$5,800.00, I believe it is, for the finishing job of this office and show room, then we should show—the jury is going to inspect the building, I presume, and there is some fine work done there—nice work that was done by Husky Furniture, and for that reason we want to show that that was paid for separately, so it will not be confused with what Mr. Gothberg did. And for that reason, your Honor, was the reason we put the check in, showing that he paid Husky Construction Company \$2,725.40. Now, this is the bill that itemized that. It says wainscoting, and weltex counter, cash register, stand and window shelves, and so on, and it itemized that check that was put in by consent.

Mr. Arnell: It wasn't by consent, Mr. Bell—no, sir. [380]

Mr. Bell: I may be wrong.

Court: I was under the impression that the check represented work done by the Husky Construction Company, that Mr. Gothberg should have done, and did not do.

Mr. Arnell: I objected to the check. As I remember the ruling of the Court was that it would be admitted for the time being, with the indication

(Testimony of Burton E. Carr.)

that a final and definite ruling would be made on it before the case was presented to the jury.

Court: The objection is sustained, and the ruling of the Court, admitting the check in evidence, is set aside, and the order is that it not be admitted in evidence or go to the jury. This may be marked for identification, Mr. Bell, to make it part of the record, of course.

Mr. Bell: All right, and of course we would like an exception.

Q. Now, Mr. Carr, you heard Mr. Gothberg testify to an extra for moving and connecting the pumps in the island? A. Yes.

Q. Now, I hand you some papers that are fastened together, and ask you to examine them and state what they are. Haven't I got too many fastened together? Something that refers to another matter? A. Yes.

Q. Which is the ones that refer to the pumps only?

A. This here is just the material, is all, for the [381] pumps—\$73.85.

Q. Did you pay for that?

A. Yes, we did, yes.

Q. What date did you pay for it?

A. May the 9th—it was billed in April 30th, and we paid it May the 9th.

Q. What year?

A. In '51. That is the second relocation of the pumps. First we changed the relocation, and there is a second relocation, and Gothberg has charged

(Testimony of Burton E. Carr.)

for relocating—I don't know how much labor he has us charged for, but we paid for all the material.

Q. Does that check and statement show that it is for material? A. For material, yes.

Court: Is it your claim that Mr. Gothberg should have stood all that expense?

Mr. Carr: No, it isn't. He billed us for relocating the pumps the second time—and here is where we show we paid for the material—and he is billing us for the material and the labor, as I understand.

Court: In other words, it would be a double charge?

Mr. Carr: Double charge—and here is where we paid for all the material to the City Electric.

Mr. Bell: We now offer it in evidence.

Mr. Arnell: If your Honor please, we object to the offer [382] upon the ground that no proper foundation has been laid. I think the direct testimony of Mr. Gothberg was that, to his knowledge, the pumps had been moved three times. Now, at a date subsequent to the date the contractor surrendered the building to Mr. Carr, this same type of work was done again. There is no showing that this was not work that might have been ordered at a subsequent date, even though the pumps had never been moved prior or a dozen times.

Court: The witness, as I understand his testimony, says it was Mr. Gothberg's job to take care of this matter, and how he himself had to do the work that Mr. Gothberg should have done. Isn't that correct, Mr. Carr?

(Testimony of Burton E. Carr.)

Mr. Carr: Well, you see the pumps was put in in the first time by Mr. Gothberg—and on account of changing the front end of the building, after the blocks were all frozen, we had to put a different front on the building, and move the pumps to the side here. And Mr. Gothberg has a bill charging me for moving those pumps, and I believe there is some material—but we are paying twice on this deal.

Court: Is Mr. Gothberg to blame for it?

Mr. Carr: If he's charged us for material for moving them pumps. That should be knocked off because we paid for the material ourselves. We have a check from City Electric.

Court: The objection is overruled. It is up to the jury to solve this, upon the conflicting evidence.

Clerk: Defendant's Exhibit O.

Court: It may be read to the jury.

Mr. Bell then read Defendant's Exhibit O to the jury.

Q. Mr. Carr, I hand you a check and statement from the Anchorage Installation Company, and ask you to examine them and state—

Court: I think Mr. Carr wants to bring some matter to your attention.

Mr. Carr: I thought that was all material. I didn't know they charged for labor. Mr. Gothberg charged for labor and material, and that is labor and material here. We paid Anchorage Installation for moving the pumps. I thought it was just material.

(Testimony of Burton E. Carr.)

Q. Then it does contain labor and material for moving the pumps? A. Yes.

Q. Now, would you tell us what that one is?

Mr. Kurtz: Is that to be given a letter?

Court: Yes—O. And Mr. Carr says now it includes labor and material. Previously he said that Mr. Gothberg had charged for the material, too. Now he claims it covers both labor and material. Is that right, Mr. Carr?

Mr. Carr: That's right. I didn't know it until he read it. There is something else with this, too, isn't there? Have you got something else? [384]

Q. Here is another paper, that was with that group of papers. Maybe that has something to do with it.

A. Oh, yes, this here is labor and material for \$27.25—that was paid the Anchorage Installation Company. Then there is a note here on the bottom. It says: "Note—this valve damaged by employees of the garage. This work chargeable to the establishment as it was not a case of faulty original installation." What happen here—when the spring thaw come along, instead of putting this cutoff valve down, according to the City ordinance, down under the paving where you could shut it off, they installed it about four feet on the wall—and naturally, the frost come through and froze it up. And water spread on the inside of the wall so the men at the garage had to take all this plyboard from the wall. The cause of it was this valve was frozen and broken, and they tried to shut it off, and they claim

(Testimony of Burton E. Carr.)

it isn't faulty installation—but it was. That is the reason we tried to turn it off, because it was leaking—frozen and broken.

Q. And that is the check and statement for repairing that particular thing?

A. Yes, and then there was another bill. I forgot about this one—it happened again. It was around \$20.00 that we paid, I believe. It was another plumbing outfit when it broke the second time, but they charged us \$20.00—but I was out [385] of the City at that time, so I forgot about this here. It was broken the second time, but we can't use it—it's cut off altogether. It's plugged off, and we can't get any water for cars on the outside of the building.

Q. Is it still that way?

A. Yes, yes,—we got it cut off so there is no water in it now.

Q. The reason you got it cut off is if you had turned it on, it would freeze?

A. It would freeze and flood everything.

Q. Is that check issued from your building fund?

A. No, this it not from our building fund. We had two funds, a building account and our regular business account, and this here is from the business account.

Q. But it was paid for by you?

A. It was paid for by us, yes.

Mr. Bell: We now offer in evidence all three of these papers as one exhibit.

(Testimony of Burton E. Carr.)

Mr. Arnell: No objection.

Court: Without objection, they may be admitted and marked Defendant's Exhibit P, and may be read.

Mr. Arnell: If your Honor please, we waive reading of them unless Mr. Bell would like to.

Mr. Bell: I would rather read it.

Mr. Bell then read Defendant's Exhibit P to the jury. [386]

Court: I think we will take a recess at this time. Ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty. We will stand in recess for 10 minutes.

Thereupon, the court at 3:05 o'clock, p.m., recessed until 3:15 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. The witness may resume the stand and counsel may proceed with examination.

Q. (By Mr. Bell): Mr. Carr, I hand you a check dated March 15, 1951, to which is attached some papers. Will you explain to the Court and jury what those are?

A. This is a check of \$17.25, and there was quite a lot of holes around the outside of the building, and I asked Mr. Gothberg to get that graded off, but he didn't do it, and I had to fill the holes so nobody wouldn't break their leg. That's for gravel.

Q. Who did you buy that gravel from?

(Testimony of Burton E. Carr.)

A. Anchorage Sand and Gravel.

Q. Is the check payable to Anchorage Sand and Gravel? A. Yes.

Q. Was it paid by you in the regular course of business? A. Right. [387]

Mr. Bell: We offer that in evidence.

Mr. Arnell: If your Honor please, I don't want to appear to be attempting to keep anything from the jury, but I think this is part of Mr. Bell's case on direct. I cross-examined Mr. Carr at some length the other day, and now Mr. Bell is attempting to introduce evidence which should have been introduced the other day. On that basis I am basing the objection.

Mr. Bell: Your Honor, you will remember, I believe, that Mr. Carr stated he had some other checks he hadn't found yet, and he did dig these up since then.

Court: It really doesn't matter. I think it would be admissible sometime, and we may as well take it in now. It would have been admissible upon direct. At any rate, the objection is overruled.

Clerk: Defendant's Exhibit Q.

Court: The check is payable to whom?

Clerk: Anchorage Sand and Gravel.

Court: In the amount of how much?

Clerk: \$17.25, dated March 15th, 1951.

Mr. Bell then read Defendant's Exhibit Q to the jury.

Q. Mr. Carr, I hand you a group of three checks, and three bills, that are fastened together.

(Testimony of Burton E. Carr.)

I will ask you to state if they represent the same transactions, or are part and parcel of the same transaction?

A. Well, these three checks—they don't include all these three [388] checks. What we are interested in—those three checks—it was given in three different checks, but it was for \$80.96. That's for 11 pieces of asbestos board that Mr. Gothberg should have put in in the fire wall. We had to buy it and pay for it.

Q. Is that part of the extras he has charged you for?

A. Yes.

Q. And you paid for it yourself?

A. Right.

Q. Do you know what the other purchases are for, besides the asphalt board?

A. Yes, this here is tile board. You see, that's in on these checks here, but that's on our own. That's tile board we had in the ceiling, and then there's some plyboard here. I don't recall just what that is, plyboard—\$37.44—three pieces, but I don't recall just what that was for.

Q. Was there plyboard used in that partitioned wall that Mr. Gothberg put in?

A. It was delivered down there—evidently it is. That would be January 5th—what it was used for, I don't recall.

Q. As I understand, the only thing that you bought, and know is a double charge, for the fire board, or asphalt board?

A. Right.

Q. Is the asbestos board separate? [389]

(Testimony of Burton E. Carr.)

A. The bill is separate. It is on the regular invoice here, and then it is on the regular bill here. But they are in with the checks. There's quite a number of checks here, but when they billed this out—I don't know how she happened to pay for it that way.

Q. Can you separate it so it will be one exhibit that will be clear to the jury?

A. Well, the one check for \$118.40—that included the \$80.00. I don't know how she's got that.

Q. Well, were all of those purchased during the month?

A. Yes, we had the bill here paid—and all we are claiming here is \$80.96.

Q. And you don't know about the others?

A. That \$37.00 deal—I don't know. I don't know what that plyboard was used for, but it was delivered down there. If it was delivered to Gothberg, and they sent the bill to us, I couldn't say.

Q. And you paid for it?

A. Yes, we paid for it. We couldn't find any other dope on that.

Mr. Bell: Ed, do you object to having all three go in or would you rather I would sort them the best I can?

Q. I will ask you this question before I offer them. Was all of that material purchased from the same people, the Ketchikan Spruce Mills? [390]

A. I believe so, but tile board is on one. You see, part of the time we had another office girl down

(Testimony of Burton E. Carr.)

there, and we've got some of that stuff mixed up, but it's paid for in those three checks.

Court: Is there objection?

Mr. Arnell: We wish to renew our objection, your Honor. There are several statements in here, one of which is for acoustical tile, that Mr. Carr testified he had to furnish himself.

Mr. Bell: He said he did.

Mr. Arnell: There is no showing, your Honor, that this is for material that was used by Mr. Gothberg, or that he should pay for it.

Court: Mr. Carr just testified the asbestos should be charged against Mr. Gothberg, and it is \$80.96. Now, if this can be separated from those papers, it may go in, even though the check is a larger amount. The jury may remember that \$80.96 is charged against Mr. Carr, that had to be paid by Mr. Gothberg.

Q. Mr. Carr, I hand you a check for \$399.00, as being the first dated check for February 5th, payable to Ketchikan Spruce Mills, and ask you if the \$80.96 was included in that check there?

A. No, I believe the \$80.96—I think you could take that, and take \$37.00, and I think they will make about \$118.00. [391] I believe it's in the \$118.00 check, but I produced a bill from this company with this marked "paid."

Q. You did pay it, did you? A. Oh, yes.

Q. I will show you this other check——

A. It's in this check here, I am almost positive, but I can get them to mark it paid down there.

(Testimony of Burton E. Carr.)

Court: Why not put that statement with this check, and then the jury will understand that Mr. Carr is claiming only out of the check the \$80.96, which should be a charge against Mr. Gothberg.

Mr. Bell: Yes, your Honor, and we ask that that be marked as one exhibit.

Court: Over the objection of the plaintiff, it may be admitted—one check and two bills.

Mr. Bell: Yes, two bills.

Court: They may be read.

Clerk: Defendant's Exhibit R.

Court: Is the asbestos on both bills?

Mr. Bell: It is carried forward.

Mr. Bell then read Defendant's Exhibit R to the jury.

Mr. Bell: And we only claim a credit of \$80.96 of the check. You make take the witness.

Court: Counsel for plaintiff may examine. [392]

Recross Examination

Q. (By Mr. Arnell): Mr. Carr, how many times were the pump locations moved?

A. The original one, and just one more.

Q. Only one? A. Only one.

Q. Now, on your first exhibit, which was introduced this afternoon, that was to the City Electric Company, was it not?

A. I don't remember offhand—it was one of the electric companies.

Q. And you testified that the work represented by that statement, which you paid, was a duplica-

(Testimony of Burton E. Carr.)

tion, did you not, of some work Mr. Gothberg charged you for?

A. Well, you see, on one of his statements it says relocating pumps—on one of his statements there.

Q. Well, do you know whether that was for plumbing or electrical work?

A. No, he was supposed to install the pumps.

Q. Just answer my question.

Mr. Bell: Let him answer it.

A. I imagine it would be Anchorage Installation. I would like to see the bill—then I could tell more about it.

Mr. Bell: He's referring to another bill than this one.

Mr. Carr: City Electric would be electrical work then.

Q. There wouldn't be any plumbing work included in that, [393] though, would there?

A. No, City Electric is all electrical work.

Q. Did the relocation of the pump island require plumbing work, also, as extra work?

A. Yes, we moved them about six feet, approximately—it could be more or less.

Q. It would require, not only the plumbers' time, but additional pipe?

A. Extra pipe—but this one pipe they put in first—we couldn't get that one pump to work very well, and when they took it apart, the coupling was broken on one of the pumps.

Q. Do you contend that that charge for electrical

(Testimony of Burton E. Carr.)

work is a duplication of something somebody else did as plumbing?

A. It says relocation of pumps, which could mean quite a bit, but if you read that bill——

Q. I show you Plaintiff's Exhibit 10, which reflects an extra of \$80.02. Would you examine that statement, Mr. Carr, please? Would you examine the statement attached from the Anchorage Installation Company? Do you find any extra electrical work on that statement?

A. I can't see on here where it says Anchorage Installation.

Q. Do those statements represent plumbing work though, Mr. Carr?

A. I forgot my glasses—I can't make that out. Well, yes, it [394] is plumbing fixtures. I can't hardly make it out, but I can see some marks that could be plumbing, but that electrical part—Mr. Gothberg was supposed to replace the pump, but I don't see where he's got any charge in here. We paid for all the electrical wires all the way through the building, because there's 140 feet there, and they wouldn't use that twice—they wouldn't tear out wires which they didn't—they used some wires and we got charged for it.

Q. Do you find any charge for electrical work?

A. They haven't got their name on the sheet here.

Q. Do you find any writing on that statement before you, which reflects that it was electrical work?

(Testimony of Burton E. Carr.)

A. No, I don't see any electrical work.

Q. Likewise, on your own exhibits, you don't find any statement reflecting plumbing work, do you?

A. On the one I have, no plumbing work, no—but what I was trying to get—and they had me charged with electrical wire—100 and some odd feet. Well, Mr. Gothberg should have paid for that wire.

Q. Where are the holes outside the building, Mr. Carr?

A. All along the side of the building, and going out the front door, there.

Q. How many yards of gravel did you buy to refill them?

A. The only thing I could get available was regular concrete— [395] gravel and sand, and that's what I bought, to fill all along the side of the building, because there were holes there and people could break their leg—and he was supposed to fill that up. He was supposed to buy all the backfilling.

Q. How many yards did you say you put in there?

A. What was on that statement—I think a yard and a half of each, I believe. I believe a yard and a half of sand and a yard and a half of gravel—but they had to mix it because they couldn't get the regular pit run gravel, because it was frozen.

Q. But a yard and a half was all you put in, is that right?

A. I believe so.

(Testimony of Burton E. Carr.)

Q. Now, Mr. Carr, how big were the holes that you filled with the yard and a half of gravel?

A. All along the side. According to the contract, he should have backfilled that. I told him I wanted it backfilled because with frost and heat there is great big holes all along the side of the building—to fill up all those holes.

Q. Do you mean, Mr. Carr, that those holes were six-inch or a foot wide, and the full length of the building, or wider?

A. It don't take much of a hole to make up even a square foot of gravel, but some of them was a foot and a half deep, and two feet deep in places—but where they backfilled, [396] the frost come in there, where the lumber and stuff was laying, and we had to clean that up—but there were holes all through that side, and it was dangerous for anybody to walk.

Q. How far did they extend from the outside of the building? A. Five feet.

Q. For the entire length of the building?

A. Different places all along there.

Q. You filled all those places with a yard and a half of dirt, is that correct?

A. Quite a bit more, because quite a bit we hauled in ourselves in the spring of the year—ourself—and the City come in in the spring and graded it.

Q. The City required you to lower the grade?

A. No, I just knew the man that was driving the city grader, and I asked him if he would mind

(Testimony of Burton E. Carr.)

grading it. We put in about three yards of gravel, but we hauled it from another place. We aren't charging him for that.

Q. Mr. Carr, did you use any of this gravel in the front of the building?

A. We used it along the side of the building where the customers had walked, from one door to the other—it was about five feet along there that we distributed that,—even if it's two inches thick from one door to the other, all along that side, it would take quite a bit of yardage. [397]

Q. Is it your testimony, then, that you didn't use any of this in the front of the building?

A. We used it along the side, from the door on.

Q. I still don't understand your answer. Do you mean that you used it along the side of the diagonal portion of the building?

A. There's one place where you come out the door—right in front of the door—that was about a two-foot dropoff right in there.

Q. Mr. Carr, I call your attention to the specifications. Is it not a fact that the contract and the specifications reflected that the backfill was all down around that portion of the building, around the low portion?

A. No, he was supposed to take care of all the backfilling on the building.

Q. That is your testimony, is that correct?

A. Yes, that's right.

Q. Well, Mr. Carr, did you do this before or

(Testimony of Burton E. Carr.)

after you sold the building—the so-called backfilling?

A. Before I did it.

Q. Now, you have testified regarding the use of some fire board. Did the plans and specifications, as such, call for a fire wall?

A. Yes, there was supposed to be a fire wall out of block.

Q. Was the purpose of it to act as a fire stop, or was that [398] merely the type of construction?

A. It was supposed to have been blocks—block fire wall.

Q. Well, did you change your mind about type of construction that was to be put into the partition?

A. Mr. Gothberg changed my mind. He wondered what kind I wanted in there, and he said it didn't go with it—but I told him that it did, and he said no, it didn't include that, and he went and checked it over, and found out it did, after we went ahead and built it out of wood.

Q. When did you agree to this change?

A. When we were building the building—before we got into the building—moved into the building.

Q. Well, Mr. Carr, do you have with you the agreements whereby you agreed to certain work for the purchasers of that building?

A. Oh, yes, I have those.

Q. Does your counsel have them here?

A. Yes, he does.

Q. Would you point out to us, in those agree-

(Testimony of Burton E. Carr.)

ments, the specific provisions which required you to do certain work?

A. It don't say any specific thing. Mr. Akers—there is a lot of stuff that is not completed, and so I said we are going to build it up to his specifications. We are going to do what Mr. Gothberg didn't do.

Mr. Arnell: Mr. Bell, do you have those agreements? [399]

Mr. Bell: Sure, I have them, but they have nothing to do with this lawsuit. He asked me to bring them here, and I did, but they have nothing whatsoever to do with this. This is the contract of sale of his business later.

Mr. Arnell: He testified he agreed to do certain work.

Mr. Bell: Well, you brought it out on cross examination. I never asked him about it.

Mr. Arnell: We can't control the scope of his testimony, your Honor. I think the Court and jury are entitled to know precisely what Mr. Carr agreed to do, and for that purpose I ask that the document be produced.

Mr. Bell: Object.

Court: How is it relative, Counselor?

Mr. Arnell: Apparently Mr. Carr relies upon this agreement to show that he has to do certain work, which, as he said a few minutes ago, is work that Mr. Gothberg should have done, and by the terms of the contract, he is going to do it. I would like to see the contract which obligates Mr. Carr

(Testimony of Burton E. Carr.)

to perform any of this work, if the jury feels it was not performed.

Court: How was this testimony brought out—on direct examination or cross examination?

Mr. Bell: All on cross examination.

Mr. Arnell: It still came out, your Honor, and I asked the other day if this agreement was in writing, and he said yes. [400]

Court: How did the testimony come in in the first place?

Mr. Arnell: As I remember, your Honor, on direct examination, he said he would have to perform certain work to bring the building up to what he represented it to these people.

Court: That is my recollection of it. He may have volunteered it, and as I recall, he said it on direct examination. Therefore, counsel has a right to inquire into it on cross examination, and the document will be produced.

Mr. Bell: Your Honor, I would like to know what contract he wants. Have him ask for a particular contract. I've got all the contracts the man has. Now, I'll present any one that your Honor orders me to.

Mr. Arnell: Your Honor, we don't know which one Mr. Carr has referred to.

Court: Maybe Mr. Carr can select it. You may step down, Mr. Carr, and select the contract which you think bears on the matter that has been discussed here.

Mr. Bell: Your Honor, while he is checking

(Testimony of Burton E. Carr.)

here, I would like to renew my objection to this for the reason that the defendant, by cross examining the witness on the matter, can make other documents go in evidence because they have been explained by Mr. Carr to him on cross examination only.

Court: I think this matter was mentioned first by Mr. Carr on direct examination, Counselor. He may have volunteered the testimony, but nevertheless he said, as I recall, on direct [401] examination, he had made certain agreements to have this building in the shape it would have been if Mr. Gothberg had complied with the contract, and I assume he conceived it bore upon the question of damages and the right to recover. While the papers are being examined, we may as well take our hourly recess, and the jury will remember the admonitions of the Court as to duty. The court will stand in recess for 10 minutes.

Whereupon, the court at 3:53 o'clock, p.m., recessed until 4:03 o'clock, p.m., at which time the following proceedings were had:

Mr. Bell: Your Honor, at this time we have furnished counsel for the plaintiff with the contract he wanted. Paragraph 13 covers exactly the question he has asked about, and we have no objection to permitting him to read it to the jury if he cares to.

Court: Very well. The record will show all members of the jury present.

Mr. Arnell: Ladies and gentlemen of the jury, I will read you Paragraph 13 of this contract: "It

(Testimony of Burton E. Carr.)

is agreed by the parties hereto (which include Mr. Carr) that certain work is to be done to finish the building, which is located on the real property above-described, and the Sellers agree to do such finishing at their own cost and expense and without liability to the Buyers therefor."

Q. Now, Mr. Carr, will you specify what work, under this [402] clause, you have agreed to do?

Mr. Bell: Object to it. It is incompetent, irrelevant and immaterial. The instrument speaks for itself, and if he tried to figure out in minute detail what he should have to do to comply with this, it is just burdening the jury with the unnecessary. It is a matter not to be passed upon in the case and is incompetent, irrelevant and immaterial.

Court: Overruled. You may answer.

A. We pointed out a number of things all over the building, Mr. Arnell, and they know just exactly what's wrong with them—the building, I agreed to put it up in shape. They only paid a small down payment on the building. They are not doing as big a business as we did, and we are liable to have to take it back, and when I take it back, I want it in great shape—I don't want it the way it is.

Q. Did you sell the building, Mr. Carr, for more than it cost you?

Mr. Bell: Object to that as incompetent, irrelevant and immaterial, your Honor.

Court: The objection is sustained.

Q. Mr. Carr, are you able to specify each item that would be included within this clause?

A. Well, that's pretty hard to say on each item,

(Testimony of Burton E. Carr.)

because we went through all those items there. There's so many of them there, I have a list of all the items that has to be [403] done. I can give you the list if you would like.

Mr. Arnell: That is all.

Mr. Bell: That is all, Mr. Carr.

Court: That is all, Mr. Carr.

Mr. Bell: We would like to call Mr. Wyke.

Whereupon, Mr. Carr was excused as a witness and

CHARLES E. WYKE

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): Will you state your name, please? A. Charles E. Wyke.

Q. Mr. Wyke, where do you live?

A. Grandview Gardens, Anchorage.

Q. How long have you lived in Alaska?

A. Approximately seven years, counting military service.

Q. And what is your business, or trade?

A. Right now I am in charge of the carpenter shop at Post Ordnance, Fort Richardson.

Q. And have you had experience in building?

A. Yes.

Q. Have you been a superintendent on building?

A. Yes.

Q. How many years of experience have you had in that line? [404]

(Testimony of Charles E. Wyke.)

A. Approximately four years for myself and one year for Johnson Construction Company as supervisor, and about six months as foreman for Archie Cupples.

Q. Did you work for Mr. Gothberg on this job for Burton E. Carr?

A. I did.

Q. How long did you work there?

A. Approximately three months, I believe.

Q. During the time you were working there, what was the condition of the weather?

A. When I first got on the job, it was just starting to get cold, and when I left it was too cold to work at all.

Q. And can you give us approximately the date that you left there?

A. About the 13th of December, I believe, 1951.

Q. Had the cement blocks been laid up to that time, or cinder blocks, or whatever they are?

A. I believe they were all done but for that one partition that was supposed to go in between the show room and the garage.

Q. Was there supposed to be a partition of blocks between the show room and the shop?

A. I understood there was.

Court: When did you say you left?

Mr. Wyke: Approximately the 16th of December. [405]

Court: You had been there about three months?

Mr. Wyke: Approximately.

Q. Was that partition in when you left there?

(Testimony of Charles E. Wyke.)

A. No, it wasn't. The floor hadn't been poured yet.

Q. Did you, at my request, go there and examine this building recently? A. Yes, I did.

Q. Is that concrete wall, or block wall, or fire wall, or whatever you call it—has that ever been built?

A. There is a wooden partition there at the time now.

Q. And is the concrete, or cinder block, partition in? A. No, it isn't.

Q. Has it ever been, or can you tell whether it's ever been there?

A. That's hard to say, but it doesn't seem they would build a partition and tear it out and put a wooden one in.

Q. There is just a wooden one there now?

A. Right.

Q. Were you there when they were pouring some concrete around the front part of the building, and Mr. Gothberg was there?

A. Yes, I was there.

Q. Do you remember an incident of a piece of lumber, or wood, being left sticking down in the concrete when they quit?

A. Yes, I remember it. [406]

Q. Just tell the jury what took place at that time?

A. Well, generally, when you pour concrete down a wall, you generally ram it down with a stick, to make it go all the way to the bottom, to make it

(Testimony of Charles E. Wyke.)

go in around the steel. And at the time we were pouring—I believe there were three of us on the job—and Mr. Gothberg came with the concrete, and I was up on top with two other fellows, pouring the concrete—and I had a stick, and I believe the other two fellows had sticks, and we were pushing the concrete to the back of the form about 12 feet down inside—and Mr. Gothberg came up at the time and took the stick from me, and told me to smooth off the tops with a trowel, which I did. And when the pour was done, I believe I was on the south wall when we finished pouring the lintels, and it was quitting time and I went home. And the next morning I went to work and went up to inspect the forms on top to see if this concrete had frozen pretty cold—and Mr. Gothberg came about that time, and he was on top, and he saw the stick in the wall, still sitting there in the corner, and right away he accused me of leaving the stick there, which I know I didn't, because I have never done anything like that. I would make sure it was clear before I left it. The concrete had set up hard enough so you couldn't pull the stick out—and the bottom of the form had come apart and snapped under the weight [407] and the concrete had poured out between the block wall and the form. It made a very messy job—that whole thing.

Q. Did you later look to see what the result was in the finish concrete, with relation to that stick, or piece of timber, having been left there?

(Testimony of Charles E. Wyke.)

A. Well, it will absorb moisture and swell, and automatically crack the wall.

Q. Did this one crack the wall?

A. I looked last spring, and the wall had cracked at that time.

Q. Now, did he do anything about repairing this concrete wall at the bottom, where the ties had broken loose and it had spread and, you stated, had become a rather messy job, I believe?

A. Well, it appears to have been chiseled off and ground in with powdered concrete to smooth the wall down. It looks a lot better now than it did when I first went back to check on it.

Q. What kind of weather were the blocks laid in?

A. Anything but mild weather. It was very cold.

Q. Can you remember approximately the temperatures along about that time?

A. I think it must——

Mr. Arnell: Your Honor, I think the temperatures would be best proved by the Weather Bureau records. [408]

Court: That is true. If the witness can name a special date, or dates, we can get the weather records, I suppose, or the records of the Weather Office. If he is unable to name any particular date, the best he can do is to say what he recalled as to the temperature when he was doing certain work. Counsel may proceed.

Q. Can you remember any particular date that

(Testimony of Charles E. Wyke.)

the blocks were being laid? Any date of the month or calendar date?

A. Well, it would have to be in November, and it was below zero—that is all I would be able to say. I know it was very cold. I remember at that time the wind blew pretty hard where we were building the marquee, and we could hardly stand to work on the door of the building at all more than 20 minutes at a time.

Q. Was there any canvas put over those blocks, or this wall where the men were laying them? Was there any canvas put there or heat applied?

A. I didn't see any canvas on any of the block work. I know there was no heat.

Q. Is there a regular approved method of applying heat for concrete block wall in the winter time?

A. Well, there isn't any I would recommend right off, because, as the block wall goes up, you can't keep it covered up. The block just shouldn't be laid in freezing weather in my estimation. [409]

Q. Is there a method whereby contractors do sometimes go ahead with laying up the concrete block wall?

A. Yes, they can put this sodium chloride in the mortar mix, which will raise the freezing point in the mortar mix, but after you put so much of the stuff in there, it tends to weaken the mortar.

Q. Is there a method whereby the wall is covered with canvas or a tent, or whatever you would

(Testimony of Charles E. Wyke.)

call it, and heat blown in there with a regular heating system?

A. If you have a roof on and four walls up, you can drape canvas over your openings, and put in a heater—you can use that to pour a floor and it will keep the floor from freezing.

Q. Do you know whether or not the weather was such that the mortar did freeze in the blocks that were laid down there?

A. Well, I worked alongside of the men who were laying them, and I know several times the men walked off the job in disgust because they didn't want to do a bad job. Sometimes they would not show up for two or three days because they refused to lay blocks when it was that cold.

Q. Did you observe the mortar that was being used by those men at that time to see whether or not it did freeze on the mortar boards?

A. Yes, they hauled the mortar up to the walls in a box, and they had other boxes that were empty, that they kept fire [410] in. They tried to keep the mortar board sitting on top of the fire to keep it from freezing, but as soon as they touched their trowel to it, and touched it to the block, as a general rule, the mortar froze immediately.

Q. From your experience, in building, is a wall very safe that is laid up that way until it's torn down and relaid?

A. Well, I am not an engineer, but for my own money I wouldn't buy a wall like that.

Q. Do you know whether or not the specifica-

(Testimony of Charles E. Wyke.)

tions—and did you see the specifications there on the ground—that provided that any cement work should be done when the temperature was below 32 degrees?

A. No, I didn't see any specifications like that. I was a workman on this job. I don't believe I ever saw specifications on the job, except perhaps for the hardware that you were referring to.

Q. Would you consider it good workmanship to lay concrete blocks, or cinder blocks, with mortar when the temperature was colder than 32 degrees?

Mr. Arnell: If your Honor please, we wish to interpose an objection. Mr. Wyke testified he is not an engineer and, in response to Mr. Bell's other questions, at least *intimidated* he wasn't qualified to answer. I think it calls for conclusions from a man who isn't an expert.

Mr. Bell: He is an expert in the line of building. He was [411] supervisor.

Mr. Arnell: We are dealing with bricks and mortar here, your Honor, not carpenter work.

Court: Are you a carpenter, principally, or do you know lots about concrete and mortar?

Mr. Wyke: Basically, I am a carpenter, but I have had experience with mortar and laying up block buildings.

Court: How much experience?

Mr. Wyke: I contracted for two years in Kirkland, Washington. I built four houses there with concrete block. Last year we put up 22 block furnace rooms on the Post.

(Testimony of Charles E. Wyke.)

Court: Did you participate in that yourself, either by working or by supervising?

Mr. Wyke: By supervising.

Court: I think he has had enough experience to answer and the jury, as with all witnesses who testify as experts, will take into consideration the experience and the qualifications. If a man has vast experience, his testimony ought to be accorded greater weight than that of a man with little or no experience. The Reporter may read the question and the witness can answer.

Reporter: "Would you consider it good workmanship to lay concrete blocks, or cinder blocks, with mortar when the temperature was colder than 32 degrees?"

A. I understand there's ways of doing it, but I don't believe [412] that the ordinary mix they use should be used that cold, no.

Q. Now, what is the general opinion, or general opinion based upon experience of concrete or concrete mortar, when the same becomes frozen. Does it or does it not disintegrate?

A. Oh, I would say four out of five times it will, yes. It turns to powder—gets powdery—the blocks can be readily jarred loose.

Q. Did you ever notice the chimney that was built in that building there, under Mr. Gothberg's construction?

A. Yes, I saw this chimney at the time it was being put up.

(Testimony of Charles E. Wyke.)

Q. Was it bad weather when that was put up, too? A. Yes, I believe it was.

Q. Did you see that chimney afterwards?

A. Yes.

Q. Before it was torn down, you saw it?

A. Yes.

Q. Just tell the jury what the condition of the mortar was between the blocks in that chimney?

A. Well, that was a classic example of mortar turning to powder. As I remember, you can take a nail head and pull it right out from between the blocks.

Q. Did you observe the front windows in this building? A. Yes. [413]

Q. Would you please tell the jury what condition they are in and what condition they have been in all along, since they were set?

A. Well, at the time I notice there was about a quarter of an inch crack along one side of the window in front there. Apparently the glass doesn't fit.

Q. Do you know whether or not there has been any sagging, or settling, of that front wall that causes that glass not to fit the opening?

A. I think it would take an instrument to determine that definitely.

Q. Well, do the glass fit the opening?

A. No, they don't.

Q. And are they such that they shut the air out completely, even patched up?

A. This one I saw is not patched at all.

Q. It had an opening? A. Right.

(Testimony of Charles E. Wyke.)

Q. How wide an opening?

A. About a quarter of an inch, running to the top of the window.

Q. Did you, at my request, inspect the bolts or rivets in the joints where the steel was put together, to see whether or not they were painted?

A. Yes. [414]

Q. Would you just tell the jury, from your examination, what you found to be true?

A. I used a pocket knife and scraped away the aluminum paint very carefully, and I couldn't detect anything except the aluminum paint on the bolts or the rivets.

Q. The heads of the rivets were red or black?

A. They were black.

Q. And had no red lead on them?

A. Not that I could see.

Q. Now, did you scrape some portions of the steel beams, themselves, to find whether they had one or two coats of paint on them?

A. Yes, I did.

Q. How many coats of paint did they have?

A. It was pretty hard to tell. There's one or two coats on them.

Q. Could you tell whether there was any rough places—could you tell there, whether or not there was one or two coats?

A. No, because apparently these aluminum coatings are put on very close together before the first one has set up. It's just like painting with new

(Testimony of Charles E. Wyke.)

paint on something that's not dry, but it did blister. There was one or two blisters on the beam.

Q. Did you satisfy yourself that there was two coats of aluminum anywhere? [415]

A. No, it's too hard to determine—with two coats over one, that one could look like two coats.

Q. I see. Approximately how many places did you check to see if red lead had been applied on the beams?

A. How many places?

Q. Yes. Well, on the joints, we will say?

A. I checked four or five different bolt heads.

Q. And did any of those have any red lead on them? A. No, these didn't.

Q. Now, construction steel, that is manufactured or fabricated at a mill and shipped in, always has a prime coat on it, does it not, or generally?

A. Generally, yes.

Q. Is that prime coat red, or what is it, generally? A. Generally red.

Q. Did you find any red lead anywhere on any of this work, other than that prime coat that was on the steel when it was fabricated at the factory?

A. No, I didn't.

Q. Did you observe the condition of the concrete blocks over the windows, and in the back part of the building—I believe that would be referred to as the south wall. Did you look those over?

A. Yes, I saw those.

Q. What condition are they in? [416]

A. There's fine, hard line cracks on some of

(Testimony of Charles E. Wyke.)

them, and otherwise the spread is as much as 1/16 of an inch.

Q. What is the condition of the mortar between those blocks, up around the windows and over the windows? A. It looks like it had frozen.

Q. Did you observe the concrete floor in the building?

A. Yes.

Q. What condition is it in?

A. Well, the concrete itself appears to be in fairly good shape now, except around the front there where it had cracked. It is flaking off and peeling there.

Q. You mean the hardness of the concrete—or is it level and smooth? Does it properly drain?

A. An instrument is the only way. I wouldn't want to check that for level.

Q. I see. You weren't in there when there was snow melting on the floor, or anything like that?

A. The floor had not been poured when I left the job.

Q. Did you, at my request, and at the request of Mr. Carr, figure the cost of all the work that Mr. Gothberg did, by way of extra, on the concrete walls—on the show room and the office, and whatever was done there—including the partition. Did you make an estimate of that?

A. Yes, I did.

Q. And did that estimate include the balcony up above? [417] A. Yes.

Q. What estimate did you arrive at that would

(Testimony of Charles E. Wyke.)

be approximately the cost of furnishing the material and the labor to do that?

A. I believe my figures were around \$2,750.00.

Q. And were you skimping on that, or did you allow additional for it?

A. I gave Mr. Gothberg the benefit of the doubt, I think.

Q. To about what extent?

A. Around \$250.00 or \$300.00.

Q. Did you do any of that work yourself there?

A. No, I didn't work on that particular part of the work at all.

Mr. Bell: I think you may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Mr. Wyke, you said that you were not an engineer. Did you mean you had had no engineering education? A. Right.

Q. None whatsoever?

A. No, I have had no formal engineering education, no.

Q. What engineering knowledge you have acquired then, has been attained through experience and working on jobs, is that correct? [418]

A. Right.

Q. In what capacity were you employed on this job? A. As a carpenter.

Q. Were you employed there during the entire time that that block work was being done?

A. No, the block work had already been started,

(Testimony of Charles E. Wyke.)

and it was up to the bottom of the windows, I believe, when I came on the job.

Q. That was about the middle of October, was it not? A. Right.

Q. Do you know whether Mr. Cupples had any block work going on at the same time elsewhere in town?

A. I believe he had one house in Rogers Park that he was finishing, but the block work had already been finished. He was finishing the inside, with carpenters.

Q. At the time this work was going on?

A. I believe so, yes.

Q. Were you acquainted with all the bricklayers that worked on this job?

A. Yes, I was.

Q. Do you know that some of them were taken off the job to finish block work on another job here in town, or did you ever have occasion to discuss that, or acquire the knowledge?

A. I don't know of any other job he had running at that time [419] that he could take them off and put them on.

Q. You testified, on direct examination, that you built the forms for the lintels?

A. I believe there was four of us there at the time, who were building those.

Q. You made some reference to the forms sagging or splitting at the bottom, or something. Did that occur on all of them, or just one?

A. I don't believe it happened on any of the

(Testimony of Charles E. Wyke.)

lintels. It happened on the beam in front of the building, where the cement wall joins the block wall on the northeast corner of the building.

Q. Is an incident like that the result of improper forming, in most cases?

A. That's right.

Q. Now, who did the forming on that particular work?

A. I believe there was I, and a man that was supposed to be a foreman on the job at the time.

Q. Did the form twist out of shape, or merely spread enough so the concrete slid out past the block?

A. If I remember right, we were not allowed time enough on the forms—before Mr. Gothberg had ordered the concrete—to tighten this back form—and we warned him about it before we poured the concrete.

Q. I didn't ask you how much time you had, Mr. Wyke. What [420] happened?

A. The concrete broke the bottom form and spread.

Q. Is that on the floor?

A. At ground level. I believe the form has been taken out.

Q. Has that portion been covered up, or chiseled off?

A. It has been patched and repaired since then.

Q. Is there any structural defect as a result of that—of the spread of the form, and the pouring of the concrete out through the crack?

(Testimony of Charles E. Wyke.)

A. You mean, is there a structural weakness there?

Q. Yes, as a result of that?

A. No, it just makes a messy job.

Q. Now, where was this wood stick that you referred to in your direct testimony?

A. I believe about within 12 inches of the end of this pour.

Q. Well, was it in the lintel or post?

A. It was in the pour next to the cement block wall.

Q. In the top or bottom, or where?

A. From the top to the bottom.

Q. All the way down?

A. It might have been six inches off the bottom—maybe more.

Q. How much of the concrete had been poured that night?

A. It was poured right to the top of the building.

Q. How long was the stick that was in that concrete? A. Very long. [421]

Q. How long was the stick?

A. Probably 14 feet long.

Q. Was it a two-by-four?

A. No, it was a piece of one-by—stuff that had been ripped down to about three inches wide.

Court: About 14 feet long?

Mr. Wyke: That's right.

Q. What had you been using it for?

A. To get the concrete to the bottom of the pour.

(Testimony of Charles E. Wyke.)

Q. You say the concrete was poured all the way up past this, and on up to the top, is that right?

A. I don't know how the stick was laying in the bottom at all, because I didn't have hold of it when the pour was finished.

Q. Wouldn't it be pretty difficult, Mr. Wyke, to leave a 14-foot stick in when somebody was handling it?

A. No, this wouldn't be the first job it's ever happened on. A man can be pretty busy during pouring of concrete—especially Vic was trying to be all over the place at one time to see the pouring, and it would be very easy to leave a stick sitting in there.

Q. Was the stick left in the center of the concrete, or the edge?

A. I believe the bottom came to the edge when we took the form up, but the top of it, I believe, was in the center [422] of the pour.

Q. And there was 14 feet of wood, then, in the center of this post, is that correct?

A. Approximately. I think it was 14 feet long.

Court: I think we shall have to suspend now. You may step down, Mr. Wyke. The trial of the case will be continued until 2 o'clock tomorrow afternoon. Another hearing comes up tomorrow morning at 10:00 o'clock. So please return tomorrow afternoon at 2:00 o'clock, ladies and gentlemen of the jury, and in the meantime, remember the admonitions of the Court as to your duty. You

(Testimony of Charles E. Wyke.)

may now retire and the court may remain in session.

Whereupon at 4:45 o'clock, p.m., September 29, 1952, the trial of the above entitled cause was continued until 2:05 o'clock, p.m., September 30, 1952.

Be it Further Remembered, That at 2:05 o'clock, p.m., September 30, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Diamond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Another witness may be called on behalf of the plaintiff.

Mr. Bell: There was a witness on the stand. Mr. Arnell [423] was cross examining him.

Court: Mr. Wyke, I believe it was. Mr. Wyke may come forward. Counsel for plaintiff may resume examination.

Q. (By Mr. Arnell): Yesterday, Mr. Wyke, you testified that you quit working on this building about December 13th or 15th, of 1950, did you not?

A. Yes.

Q. At that time was the rough-in-work, including the partition between the rear and the front portion of the garage—was that work completed?

A. No.

Q. When I say completed, I don't mean finished by Husky Furniture, but had the rough-in work

(Testimony of Charles E. Wyke.)

all been done, including the hanging of the double door?

A. No, that wasn't put up until after the floor was poured, I don't believe. I wasn't there when the floor was poured or when the partition was put in.

Q. None, then, of the rough-in work was done at the time you finished, is that right?

A. On that partition.

Q. Well, how about the rough-in work on the inside of the show room?

A. I believe the doors were in, and I believe that was all. The two front doors were on. [424]

Q. Had the windows been installed at that time?

A. No, they hadn't.

Q. How were they covered? Were they covered with plywood sheets?

A. I believe we had plywood sheets up there for awhile, and he had to take them down to use them for something else.

Q. Now, yesterday, Mr. Wyke, you gave Mr. Bell a figure of \$2,750.00 as your estimate of certain work. Do you have that broken down with you here today? A. No, I don't.

Q. Did you ever make any memorandum of it?

A. I could tell you what I figured, yes.

Q. Now, first tell me what type of work that figure included?

A. Rough carpenter work that went into the partitions, the material, the sheathing that went on, and the forming strips for around the front there,

(Testimony of Charles E. Wyke.)

that Husky Furniture later put the plywood on.

Q. How many feet of lumber did you figure it would take to rough-in the ceiling and all of the inside walls, included in this figure you gave Mr. Bell?

A. I haven't got the paper with me. I had Columbia Lumber figure this lumber for me so I wouldn't make any mistakes.

Q. How many feet of each type of lumber would be required?

A. I would have to have my notes to refresh my memory.

Q. How many man hours of carpenters would be required? [425]

A. I believe I figured two men for 10 days.

Q. How many hours per shift?

A. Nine hours.

Q. That would be 180 hours, is that correct?

A. 180 for two men? It would come to more than that, wouldn't it?

Q. Nine hours per day per man for 10 days?

A. Nine hours a day for two men for 10 days.

Q. In other words, 18 hours a day?

A. Right.

Q. And 10 days would be 180 hours?

A. You have overtime in that, too.

Q. Upon what basis, Mr. Wyke, did you arrive at this figure of 180 hours? A. Estimation.

Q. What did you take into account when you estimated 180 hours?

A. The work I outlined just now.

(Testimony of Charles E. Wyke.)

Q. With two men, and only two men?

A. Two men could do that rough work very easy.

Q. Within a period of 10 days?

A. Yes.

Q. Would that include the framing in of the windows—installation of the windows?

A. That is not what I was asked to estimate.

Q. What did Mr. Bell ask you to estimate?

A. The framing of that partition, the balcony, the sheathing, the asbestos that went on that partition, and the forming strips that were used on the walls around the front of the show room there.

Q. You had forming strips all the way around, did you not, except in the partition across the building? A. Right.

Q. Did you figure those in, too—the ones on the side walls?

A. Yes, around the show room there.

Q. Did your figure include finishing the ceiling with the material Mr. Carr bought?

A. No, I didn't figure any finishing work at all.

Q. You didn't figure any finishing work?

A. Right.

Q. Can you give any estimate at this time as to what the finishing work would be?

A. No, I think I took a day and a half to figure out what I did to be sure I was right. I wouldn't attempt to give an estimate now on what that costs.

Mr. Bell: Object to that, anyway, because all the evidence shows Husky Construction Company

(Testimony of Charles E. Wyke.)

did the finishing work. Therefore, it wouldn't make any difference.

Court: Overruled.

Q. Do you know how much work Husky Furniture did, Mr. Wyke? [427]

A. I wasn't there.

Court: Answer the question.

A. I have no idea how much they did, no.

Q. If Mr. Gothberg did the finishing around the doors, and all of the other finishing except what has been testified to as having been done by Husky Furniture, would there be additional charges, over and above this figure that you have given us?

A. If Mr. Gothberg had done the finishing work?

Q. Yes.

Mr. Bell: Object to the question for the reason that Mr. Gothberg testified what he did, and it did not include that.

Mr. Arnell: It included, your Honor, certain finish work around the windows and door frames.

Court: Overruled. This is an expert witness. He may answer.

A. No, I have given him the benefit of the doubt by raising this estimation over and above what my actual figures were.

Q. Will you answer my question, Mr. Wyke, please?

A. You are asking if he would have charged anything extra, above the cost of material and labor, is that right?

Mr. Arnell: Would you read the question, please?

(Testimony of Charles E. Wyke.)

Reporter: "If Mr. Gothberg did the finishing around the doors, and all of the other finishing except what has been testified to as having been done by Husky Furniture, would [428] there be additional charges, over and above this figure that you have given us?"

A. I don't think it would have anything to do with what I figured, because it wasn't in the figure.

Q. Just answer the question.

A. I am not evading. I don't know what you are trying to get at.

Q. Did your estimate include hanging of any doors? A. No.

Q. Framing of the doors? A. No.

Q. Framing or installation of the windows?

A. The windows never entered into it.

Q. You mean you didn't figure framing of windows? A. Right.

Q. You figured only the material and time it would take to rough-in the interior portion of the building, is that correct? A. Right.

Q. And you left on December 15th, so you do not know how much work was done by Mr. Gothberg on these other extras after you left, do you, Mr. Wyke?

Mr. Bell: Your Honor, object to the form of the question because the windows, and the doors, and the glass, and all of that is in the contract. [429]

Court: Overruled. You may answer, if you know.

Mr. Bell: **Exception.**

(Testimony of Charles E. Wyke.)

A. I don't think there was much extras on those windows.

Court: The question is, do you know what was done after you left?

Mr. Wyke: I have no idea.

Court: That is what counsel is asking for.

Q. Mr. Wyke, is it also not a fact that the windows were installed in and around the office?

A. There are windows there, yes.

Q. Do you know who installed those?

A. I have no idea.

Q. If those were installed by Mr. Gothberg, would the cost and charges of this be added to the figure that you have given of \$2,750.00?

A. Yes, that would be outside of what I figured, yes.

Q. Now, yesterday, Mr. Wyke, you testified that the mortar froze immediately, was that correct?

A. Absolutely.

Q. You mean that, before they could get it off the trowel, it froze?

A. No, as soon as it got on the block. They did get it on the block, but it was in a semi-state of being froze before the block was laid.

Q. Was it frozen to the point where the blocks could not be [430] laid in place?

A. No, but it was frozen enough so it wouldn't bind to the blocks.

Q. All right. Mr. Wyke, how much experience have you had in block laying?

A. Of my own work, or supervision?

(Testimony of Charles E. Wyke.)

Q. Your own work, first.

A. I have laid about four separate duplex block buildings down in the States, and I have done some up here on my own.

Q. On those that you have done up here on your own, did you do those after this particular job, or before?

A. I have done them since and before.

Q. Under similar conditions?

A. No, I have never attempted to lay blocks in freezing weather.

Q. Did you attempt to—in the State of Washington?

A. It never gets that cold down there.

Q. Had you ever had any experience, Mr. Wyke, in laying blocks in weather of this kind?

A. No, I haven't, no.

Q. Do you know what the effect would be of laying blocks in weather of this kind?

A. It was very plain—the way they were laying them—that they were not sticking, and the men were taking them back out.

Q. Were you there when the west wall went up?

A. Yes.

Q. Were you there when the east wall went up?

A. Partially, yes.

Q. Weren't the conditions you have described in existence at the time those walls were built?

A. The upper parts of these walls—all of them, yes.

Q. Well, yesterday you said that the concrete

(Testimony of Charles E. Wyke.)

would disintegrate if it was frozen, is that correct?

A. I don't believe that is the word I used, is it?

Court: I think it would be better for all of counsel not to say "yesterday you testified so and so." The proper question is, "Did you, yesterday, testify to so and so?"—then if the witness says "yes", proceed.

Q. Did you, yesterday, testify, Mr. Wyke, that if mortar froze that there would be a tendency for it to decompose or weaken?

A. Yes, I did.

Q. Is that a condition that will occur in all mortar?

A. I have never seen all mortar, but on this particular job, yes.

Q. In other words, Mr. Wyke, if mortar freezes, will it likewise soften?

A. No, I don't believe it will.

Q. What do you mean?

A. I have never been on all jobs. I couldn't testify to that. [432]

Q. Well, what kind of an inspection did you make out here on this building the other day, at the request of Mr. Bell?

A. I looked at the walls—the condition of them—and the mortar that was in the walls.

Q. When you say you looked, what did you do—just stand off at a distance and look?

A. I took my knife and flaked it right out of them—just like this powder.

Q. Where did you do that?

(Testimony of Charles E. Wyke.)

A. Over the balcony, over above the marquee in one place, and on the back wall.

Q. Is it not a fact, Mr. Wyke, that the inherent tensile strength of mortar is less than that of cinder block, even though the condition is good?

A. I understand it is.

Q. Do you know what the tensile strength of mortar is?

A. No, but I know that blocks are built under pressure, and mortar isn't laid under pressure.

Q. Do you know what the tensile strength of ordinary average mortar is? A. No.

Q. When you examined these blocks, did you push any of the blocks?

A. I didn't, no.

Q. Do you know whether or not they are loose?

A. I couldn't say now, whether they are or not. I didn't notice any of them were loose.

Q. Mr. Wyke, if the concrete were frozen to the degree you have indicated, would the mortar adhere to any of the blocks?

A. Yes, they do to a certain degree.

Q. When you say to a degree, what do you mean?

A. They didn't bind the block, as if they were laid in good weather, or under ideal conditions.

Q. If the condition of the blocks, now, was firm—that is, the mortar and block were firmly bound together—would that indicate that you are wrong in your conclusion as to the extent of freezing? A. If what you say is true, yes.

(Testimony of Charles E. Wyke.)

Q. Did you observe the condition of the walls out there, Mr. Wyke? A. Yes, I did.

Q. Do you know whether or not those cracks are normal in that type of construction?

A. Any cinder blocks, yes. Cinder blocks have a tendency to crack more than concrete.

Q. Would you describe to the jury how these cracks run?

A. I believe there's only two or three in the whole building that run from the top of the wall all the way to the foundation. Most run from the top half away down, or from the [434] bottom half way up.

Court: May I ask, just as a matter of interest, have you any idea why cinder blocks are more subject to cracking than concrete block—something in the construction of the block?

Mr. Wyke: Cinder block is made of more brittle aggregate than concrete, and it has a tendency to crack.

Court: Counsel may proceed. I was just curious.

Q: Did you observe any of the cracks running directly through the center of the block, Mr. Wyke? A. Yes, I did see a few.

Q. Where the blocked is cracked through the middle, does that indicate that the mortar is adhering properly to the block?

A. The crack couldn't get a start unless the foundation was faulty.

Court: Answer the question.

A. So that this mortar would have to be—

(Testimony of Charles E. Wyke.)

whether it's good or bad, generally, it could crack, yes.

Q. What does the fact that the block is crecked crossways through the heart of the block indicate to you, Mr. Wyke, as an expert?

A. The way those cracks go—is that what you want?

Q. Yes.

A. I would say the foundation is settled—and the poor bind on the mortar—that is, it isn't adhering to the block [435] the way it should.

Q. Where you observed a crack through the center of the block, did you examine the mortar?

A. Two or three places, yes.

Q. Had the mortar adhered properly to the block?

A. In some places it had, and some places it hadn't.

Q. Can you point out where those places are in the building?

A. Generally in the cracks from the foundation up, the mortar is in good condition, but where it is on top of the building down—like over the marquee there—the mortar is powdery, where the building had frozen at that stage of the construction of it.

Q. Now, in regard to mortar that has not been frozen, Mr. Wyke, will it not powder and flake just the same as other mortar?

A. If inexperienced people are mixing the mortar.

(Testimony of Charles E. Wyke.)

Q. Assuming it is properly mixed, can you still scrape it off? A. It shouldn't, no.

Q. Will you answer my question. I don't think that is responsive, your Honor.

Court: It seems to me to be an answer.

Q. Is it your answer—no—that you couldn't scrape it off?

A. That is right—no.

Q. Under any conditions?

A. You are putting conditions in there now. If the mortar is [436] properly set in there, and mixed right, it should be as hard as concrete and just as binding, and you can't chip it, no.

Q. In your inspection, Mr. Wyke, did you look at the walls to determine whether or not they were plumb, and in line, both horizontally and vertically?

A. They appeared to be plumb in all respects, yes.

Q. Did you actually look to make that determination?

A. I believe I looked down the east wall, or the west wall rather, and it appeared to be plumb—that is the largest wall in the building.

Q. At the time those blocks were being laid, were they all placed in proper alignment and distance, with respect to each block?

A. I didn't watch every block being laid, but from what I saw there, it was a very well done job, because the men that were on it were expert block layers.

Q. Was it necessary to go back and chip off any

(Testimony of Charles E. Wyke.)

of the mortar later, on either the outside or inside of the building, with a few exceptions.

A. I didn't notice any of that work being done, no.

Q. In other words, at the time most of the blocks were laid, they appeared to be in good condition, so far as alignment and everything was concerned?

A. What they could lay, yes. [437]

Q. When you examined the paint, Mr. Wyke, did you find on all of the beams a base coat of red lead? A. Shop coat, yes.

Q. That is the coat that is ordinarily applied at the factory, is it not? A. Right.

Q. Did you examine the beams to determine whether there had been any patch work done?

A. You can't see under that aluminum paint whether there was or not.

Q. Then, if abrasions had been painted with red lead as soon as they were painted with aluminum, you couldn't, at that time, say that they had or had not been spot painted?

A. That is right. You couldn't unless you found a spot.

Q. Before you left, Mr. Wyke, did you hang the double doors in the partition between the show room and the mechanics' section? A. No.

Q. Did you hang, or help hang, the 12 by 12 outside door? A. The rolling door?

Q. Yes. A. Yes, I was in on that.

Q. Was that actually and completely installed before you left?

(Testimony of Charles E. Wyke.)

A. Not to my specification, no.

Q. What had to be done to it? [438]

A. We hung the door, but we suggested more bracing up there to hold these tracks in place, so the door wouldn't slide out of the tracks, but we never got any action on it. We left the door sitting in mid-air, practically.

Q. Do you recall an incident when a truck ran into the garage and some portion of the top struck the door?

A. I vaguely remember something about that, yes.

Q. Did that have any effect on the operation of the door?

A. I don't remember whether we had the door up at that time or not.

Q. Did you install the 8 by 8 door in the south wall?

A. Yes, we had the same bracing column on that door.

Q. That was installed before December 15th, then—about that date?

A. Around there, yes.

Mr. Arnell: That is all.

Court: Is there any further direct examination?

Redirect Examination

Q. (By Mr. Bell): Do you remember whether or not the electric part of that big door had been connected and was operating before you left or not?

A. No, it had not been connected.

(Testimony of Charles E. Wyke.)

Q. Do you remember, after they first put the door up, that it fell a time or two? [439]

A. The bottom part of the door had to slide back, and it went off the track, and fell down practically every time we opened the door.

Q. Was that condition still existing there at the time you left? A. Yes, it was.

Q. Now, Mr. Arnell asked you about cinder block. Was there any cinder block used there, as far as you know, or pumice block?

A. I believe he was referring to the cinder at the same time.

Q. Well, pumice block is altogether a different thing?

A. Yes, they are a different block altogether.

Q. There is cinder block, and then there is concrete block, and then there is pumice block, isn't there? A. Right.

Q. I see. Now, weren't you there when they poured the concrete over the front windows?

A. Yes.

Q. Was there anything that came up about the metal rod not tying in at that time?

Mr. Arnell: If your Honor please, I believe that is beyond the scope of direct and cross, both. I hate to object, but I certainly know I didn't bring it out on cross, and I know Mr. Bell didn't on direct.

Court: Overruled. Counsel is probably right. It may be [440] answered to get the whole thing before the jury, and counsel may cross examine later if he desires.

(Testimony of Charles E. Wyke.)

A. The rods that was in the lintels, I believe five or six one-half inch steel rods was supposed to go in there. If I remember right, it was on a Saturday when we put the steel in, and went home, and we came back Monday morning and tied in a couple of places, but it wasn't thoroughly tied, nor ready to pour.

Q. Were they tied, then, and was the rod tying done before the concrete was poured?

A. Not all of it, no.

Q. Do you remember whether or not there was a conversation between some of you, and Mr. Gothberg, about not having those rods tied?

A. Yes, that was on the snap ties on the frames—on the large pour in front there.

Q. What did he say about it?

A. He came one morning, I believe, and said the concrete would be there at 1:00 o'clock. I told him, "You mean tomorrow, don't you?"—and he says, "No, I mean today at 1:00 o'clock," and I said, "We won't be ready because the ties won't be done"—and he insisted we pour at 1:00 o'clock. And he left, and after lunch we went back to tying up this frame, and about 12:30 the concrete came, right after we got back to work, and he insisted on pouring now, and not waiting [441] until we were done.

Q. Did he go ahead, then, and have the concrete poured without the rods being fastened?

A. Yes, we poured the concrete, and in my estimation that is why the bottom of that frame gave out, because it wasn't properly cinched up.

(Testimony of Charles E. Wyke.)

Q. Is the settling of that front wall the cause of the windows not fitting in the front?

A. Yes.

Q. The window frames are not square?

A. No.

Q. Could you tell the jury why they are not square—why the window glass can't fit them?

A. Well, when the frame is poured it should be reinforced, and it never was. It throws the window box out of square and doesn't fit the frame. It will pull the window frame, inside the frame, out of square.

Q. Is that what happened there?

A. Yes.

Q. Now, you were asked about the heat in the place by me yesterday, and I don't believe that I asked you whether or not there was some method used whereby the wall was entirely covered with a frame, or canvas, so that the heat would take care of the laying of the blocks. Now, is there such a method—a recognized method? [442]

A. Yes, there is.

Court: Counsel, this subject was gone into yesterday. I don't know any reason to repeat it unless there is something new that you are trying to bring out. The witness testified at some length about it.

Q. All right. Now, you told, or did you tell Mr. Arnell a few minutes ago, that the cause of the blocks being loose in the wall was the poor bind of the mortar on the blocks?

A. Right.

(Testimony of Charles E. Wyke.)

Q. And did you find that condition in several places that you inspected out there?

A. Yes, I did.

Q. Mr. Arnell asked you about the cracks in the wall. Would you tell the jury about how many large cracks you found in the walls there?

A. Well, they could all be considered large. They separate the wall.

Court: Counselor, you went into this at length yesterday and the witness testified, I think, quite fully, and Mr. Arnell simply made some cross examination upon it. I think the subject is covered.

Mr. Bell: I don't believe I asked how many—that is the only thing.

Court: If anything was overlooked, you may go back and check it over. [443]

Q. All right. Would you tell the jury about how many of those cracks there is that you have discovered in looking at the wall?

A. I believe in the west wall there was nine cracks; in the south wall there was four; in the east wall there was around seven; and the other has two or three large ones in it.

Q. Two or three? A. Yes.

Q. Had the heat been turned on in the place before you left? A. No.

Q. And I believe you quit December 13th?

A. Right.

Q. And was the floor frozen at that time, that is, the outer floor—was that frozen when you left?

A. Yes, it was frozen solid then.

(Testimony of Charles E. Wyke.)

Q. I believe you were asked about the specifications. I will ask you if you agreed with this in your work as supervisor—that this is necessary——

Mr. Arnell: If your Honor please, I think the specifications speak for themselves. Whether he agrees or disagrees is immaterial. You are asking for his opinion—whether he agrees with it or not.

Mr. Bell: Well, he is an expert.

Court: You may ask the question. Don't answer it immediately. [444].

Q. I am reading from IV-03: "Masonry shall be erected when the temperature is above 32 degrees F. No masonry may be erected when there is a probability of the temperature falling below 32 degrees F. in the next 48 hours. Erection may be accomplished in colder weather if the work is heated and is specifically approved by the engineer. No frozen work may be built upon. Blocks are to be returned at windows and doors." Do you agree that that is a necessary method of making a good wall with concrete blocks, or masonry blocks of any kind?

Mr. Arnell: We wish to interpose an objection. Now, in the first place, Mr. Wyke said he was not an engineer, and only an engineer can qualify to answer that question. I think Mr. Wyke is not competent to pass an opinion upon it.

Court: Overruled. You may say whether that is a necessary method, from your own experience.

Mr. Wyke: Yes, when the weather gets cold, we

(Testimony of Charles E. Wyke.)

always cover the work with canvas, and run heat in it to keep the blocks warm.

Court: I think this was all gone over yesterday, Counselor.

Mr. Bell: I won't go into it again.

Q. Now, Specification B—I wish to ask you, if in laying up those blocks, there was any 5/16th inch round bars laid [445] between the rows of concrete, or pumice blocks, as they were laid up?

A. No, I don't believe so.

Q. Did you ever see any steel rods laid in between the blocks as it was being laid up at all?

A. No, I never.

Q. Were you in a position, if those rods had been used, could you have seen them?

A. Yes, they worked right alongside of us.

Q. I see. Mr. Arnell asked you if you examined the beams to see if red lead was used on the cracked places, or abrasions, and I believe you answered you did not. Is that right?

A. That I did not test these places?

Q. That you did not test any places like that?

A. I tested the beams and rivet heads, and there was no new red lead on them at all.

Q. Was there any red lead, either new or old, on the rivet heads? A. No.

Q. I believe you testified, in answer to a question by Mr. Arnell, that you assisted in the hanging of the 8 by 8 door in the south end of the garage? A. Right.

Q. You said something about reference to the

(Testimony of Charles E. Wyke.)

track. Would you [446] explain what you meant?

A. Well, these tracks come in solid places. They come up by the door and run out. They have to be suspended and braced to hold them in one position, and Mr. Gothberg didn't think that we should take the time to put extra bracing on there to hold them in one place. Consequently, the door, when it went up, could move one way or the other. It was just floating.

Q. Was that condition still there when you left?

A. I noticed one brace on the track, not suspended from the roof.

Q. When did you notice that?

A. A week ago—two weeks ago.

Q. Is that on the back door?

A. It is on the small door.

Q. Would you tell the jury how that is put on there—on the 8 by 8 door?

A. We suspended the track with two-by-fours, nailed to roof joists, and I noticed one at an angle to hold one track in place from the roof.

Q. How far is the track below the roof?

A. Probably eight feet, maybe.

Mr. Bell: You may take the witness.

Recross Examination

Q. (By Mr. Arnell): [447] Mr. Wyke, you have testified that you were employed as a carpenter there on the job? A. Right.

Q. Did you spend your time carpentering, or inspecting the laying of blocks as they went in?

(Testimony of Charles E. Wyke.)

A. I worked with these men. I know them all.

Court: Answer the question.

A. No, I didn't inspect the building—no.

Q. When you said then, in response to one of Mr. Bell's questions, about these rods that were laid between the blocks was to the effect, "I don't believe so", you actually don't know whether they used or did not use the rods, do you?

A. I never saw any on the job. I don't know whether they used any.

Q. You don't know whether they did or didn't use them?

A. As far as I know, they didn't use any.

Q. Were you watching all the time to determine if they did or didn't?

A. No, but they lay this webbing in there, and you can see it at any stage of construction.

Q. Webbing or rods?

A. Steel webbing is what they use.

Q. You testified, now, that none was used?

A. As far as I know, no, there never was any on the job. [448]

Q. Do you mean to infer to the jury that because you didn't see it, the rods were not used?

A. I was there when the blocks were being laid.

Q. And it is your testimony there were none used? A. Right.

Q. Mr. Bell asked you about the two doors. I will ask you, Mr. Wyke, were those installed in accordance with the plans and specifications, if you know? A. I don't believe they were.

(Testimony of Charles E. Wyke.)

Q. Why not?

A. Because they were not the doors that were designed for that opening.

Q. The design of the door has nothing to do with the manner it is hung, does it, Mr. Wyke?

A. Yes, it has. Most of these doors are of a standard type, but there is different construction and different installation.

Q. Do you know what type of door was called for by the specifications?

A. No, I know at the time that Mr. Gothberg said he couldn't get what he wanted and he had to take what he could get.

Q. Did the specifications call for a 12 by 12 door?

A. That is the size of the opening. It must have been what it called for.

Q. Did the specifications specify the type or make of door? [449] A. I don't know.

Q. When you say that the doors were not hung in accordance with the specifications, Mr. Wyke, actually you don't know, do you?

A. I was saying that we had to hang the door that Mr. Gothberg could get, because he said he couldn't get what he wanted.

Q. Well, was the door hung in accordance with the specifications?

A. It was hung in accordance with the instructions that came with the door.

Q. You testified to a number of cracks on the walls. How was that mortar mixed out there?

(Testimony of Charles E. Wyke.)

A. On the job?

Q. Yes.

A. I don't know about the lower half, but the upper half was 1-1-6 mix.

Q. Will you refer to each part you are talking about, please?

A. One part mortar cement, one part lime, and six parts sand.

Q. Was anything else used?

A. Sodium chloride, I believe, was used after the freezing weather came.

Q. Was hot water used in the mix?

A. Yes, they heated water in the building with a small fire they had to keep the water from freezing.

Q. I will ask you, Mr. Wyke, what is the tensile strength of [450] mortar mixed 1-1-6, if you know?

A. I don't know.

Q. Do you know the tensile strength of pumice block? A. I don't know.

Q. In other words, you don't know whether the tensile strength of mortar is greater than the block, or whether the block strength is greater, do you?

A. No, I don't know.

Q. If a block had cracked through the middle and the mortar still adhered solidly to the block, would that indicate to you that the mortar was stronger than the block?

A. Not necessarily, no.

Q. Would it indicate to you that the mortar properly adhered to the block? A. No.

Q. What would it indicate to you, then?

(Testimony of Charles E. Wyke.)

A. It would indicate that the break coming through the wall there, around each end of the block, was greater than the weakness of the crack going around the blocks. In other words, it goes through the area of least resistance through the block.

Mr. Arnell: That is all.

Mr. Bell: May I ask one question. He asked about the webbing. I hadn't heard about that.

Redirect Examination [451]

Q. (By Mr. Bell): What is the webbing that Mr. Arnell referred to?

A. It is steel rods that runs parallel, generally of about 3/32nds inch thickness, or 1/8th inch—and in between these two there is diagonals of more steel weld to these two parallel rods, generally about six or eight inches wide.

Q. If that is in the wall, would that prevent cracks going up and down through there, normally?

A. Normally, yes.

Q. That, I believe you told Mr. Arnell, was not in the wall? None of that was in the wall?

A. No.

Mr. Bell: That is all.

Recross Examination

Q. (By Mr. Arnell): Mr. Wyke, will you explain the difference between web and pencil rods?

A. Are you referring to snap ties as pencil rods?

Q. No, I am referring to rods used to tie block.

(Testimony of Charles E. Wyke.)

A. Pencil rods are generally used in your frame work—what is called pencil rods—they are not used in block work.

Q. What would you call the rods laid in the blocks?

A. I have never seen that operation, where they used short rods.

Q. Do you know what the specifications called for in this case? [452]

A. I know it is standard procedure to put reinforcing in on every third course on any type of block work.

Q. Would you answer my question, Mr. Wyke, please?

A. Do I know if it was put in there?

Q. Do you know what the specifications called for?

A. Not on this particular building, no.

Mr. Arnell: That is all.

Mrs. Curtiss: During the time that you were a contractor for yourself, did you do your own estimating?

Mr. Wyke: Yes.

Mrs. Curtiss: Well, then, if you did your own estimating, why did you find it necessary for Columbia Lumber to estimate material?

Mr. Wyke: So that I was sure I didn't make any mistake on it, and also to check the price of lumber that year.

Mr. White: I would like to know what snap ties are?

(Testimony of Charles E. Wyke.)

Mr. Wyke: Snap ties are used to hold frames together, especially plywood frames. You drill a hole through the frame on each side, and the rod goes on and it is run through the wall before the concrete is poured. Two buttons are put on each end on the outside of the frame, and these are tightened down. When the concrete is poured, it pours all the way down, and these hold the frames from pushing out. You have push on each side, and after the concrete is set up, the buttons are unscrewed, and they pull those out of each end—and when the [453] forms are removed, these rods are sticking out of the wall, and when the frame is removed, these can be pulled out—that is why we call them snap ties.

Miss Wise: Yesterday you said something about a 14-foot pole. Well, how high is the wall?

Mr. Wyke: Approximately 12 feet high. You have to have a stick longer than the frames to have something to make sure the concrete is down there.

Miss Wise: Where in the building was that?

Mr. Wyke: This was on the front of the building—on the northeast corner.

Mr. Kurtz: About what time of the day did that occur? Was it much after 5:00 o'clock, or was it at the regular quitting time?

Mr. Wyke: No, that was the very first part of the pour. It happened about probably 1:00 o'clock, or 1:30.

Mr. Kurtz: Then, apparently, that stick must

(Testimony of Charles E. Wyke.)

have been in there from that time on until the next morning, when it was discovered?

Mr. Wyke: Right, and the concrete had frozen or set up. It was in there solid.

Mr. Bell: May I ask one more question about that?

Redirect Examination

Q. (By Mr. Bell): What happened to the stub of the stick that stuck up above [454] the concrete? What did you do about that?

A. I don't know. I came later and I noticed it had been broken off close to the concrete.

Mr. Bell: That is all.

Court: Ladies and gentlemen of the jury, you will remember the admonition of the Court as to your duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 3:02 o'clock, p.m. recessed until 3:12 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Another witness may be called.

Mr. Bell: We would like to call Mr. Victor C. Rivers.

Whereupon,

VICTOR C. RIVERS

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): Will you state your name, please?

A. My name is Victor C. Rivers.

Q. Are you a registered and professional engineer? A. Yes, sir, I am.

Q. What school are you a graduate of, Mr. Rivers?

A. Well, I went two years to the University of Washington, and one year to Northwestern for a degree in civil engineering, [455] and McKinley College of Engineering in Chicago.

Q. How long have you been practicing at your profession? A. 21 years.

Q. How long have you lived in Alaska?

A. I have lived in Alaska all except 11 years of my life, I am 48 years old—37 years.

Q. And your office is in Anchorage at this time?

A. Yes, sir, it is.

Q. Mr. Rivers, were you employed to make specific examination, I will say, of the building known as the Nash Garage here in the town of Anchorage?

A. Yes, sir, I was.

Q. Did you do that? A. Yes, sir, I did.

Q. I hand you a report and will ask you to state if this is the one you prepared?

A. This is a copy of an analysis of the plans and specifications and contract documents, and appraisal

(Testimony of Victor C. Rivers.)

of the building known as Nash Garage. I prepared it—it appears—from the seal and my signature.

Q. And that was furnished to Mr. Carr, was it not? A. That was.

Mr. Bell: We think it will save time and may be convenient if we can have it before the Court and the jury. I will give you one to use. [456]

Mr. Arnell: I wish to interpose an objection. It is not the best evidence. Mr. Rivers is here in court and has come to testify and I think, for that reason, counsel should be required to continue his examination, bringing out points he intends to stress to the jury.

Mr. Bell: I intend to do it. I thought it would be handy to have it before your Honor and Mr. Arnell.

Mr. Arnell: I thought you offered it.

Mr. Bell: I do offer it.

Court: The objection will have to be sustained at this time.

Mr. Bell: All right.

Court: It may conceivably, at some time, be admissible to illustrate the testimony of the witness, the same as financial reports, but not now.

Q. Mr. Rivers, I am referring to page 4 of the report, and ask you to state whether or not the specifications were presented to you, and all of the plans, and the contract?

A. The specifications and plans were presented to me in complete form, and many of the plans—eight of the ten plans—bear the initials “V.G.”, and many of the sections of the specifications bear

(Testimony of Victor C. Rivers.)

pen and ink initials "V.G." Mr. Carr stated they were the original specifications and plans, and that "V.G." represented the initials of Mr. Gothberg.

Q. And you had those before you during the time that you were [457] working on the report, and also the examination?

A. That is correct. I had the plans and specifications on August 16th, and made an inspection on August 19th and August 25th.

Q. Will you tell the jury whether or not there was such a section, GC-19, at page GC-6, concerning the correction of work before final payment? I call your attention to page 4 of your report.

Mr. Arnell: If your Honor please, I think this question is immaterial. The specifications are in evidence, and whether Mr. Rivers thinks that this particular paragraph was or was not included is immaterial. It is a waste of the Court's time, and the jury's time, and our time, too.

Court: Did you read all the specifications?

Mr. Rivers: Yes, sir.

Court: The objection is sustained.

Mr. Bell: Exception.

Q. Does Paragraph BC-19, as set forth in those specifications, carry about the same requirements that is approved by professional engineers normally in buildings of this kind?

A. It is almost a standard clause in general conditions of any contract for construction.

Court: If counsel means to qualify this provision, he can read from the specifications so the jury

(Testimony of Victor C. Rivers.)

will know what the witness is talking about. The specifications are in evidence. [458]

Mr. Bell: Yes sir, they are, your Honor.

Court: I don't know just what is being approached.

Mr. Bell: It is going to be hard to find in here—it's easy this other way. I was trying to save time.

Q. Mr. Rivers, I am reading from GC-19: "Correction of work before final payment. The contractor shall promptly remove from the premises all materials condemned by the engineer as failing to conform to the contract, whether incorporated in the work or not, and the contractor shall promptly replace and re-execute his own work in accordance with the contract and without expense to the owner, and shall bear the expense of making good all work of other contractors destroyed or damaged by such removal or replacement." Now, is that the standard clause—I believe you stated it was?

A. Yes, approximately, it is.

Q. Now, I will ask you about this clause following: "If the contractor does not remove such condemned work and materials within a reasonable time, fixed by written notice, the owner may remove them and may store the material at the expense of the contractor. If the contractor does not pay the expense of such removal within ten days' time thereafter, the owner may, upon ten days' written notice, sell such material at auction or at private sale, and shall account for the net proceeds thereof, after deducting all the costs [459] and expenses that should

(Testimony of Victor C. Rivers.)

have been borne by the contractor." Is that one of the regular standard clauses that are used ordinarily by professional engineers?

Mr. Arnell: If your Honor please, I wish to interpose another objection on the grounds that this is immaterial. The contract is in evidence before the jury. It is an agreement of the parties. Whether this is incurred in another contract, or not, is really immaterial. I think it is time consuming and not beneficial to the jury.

Court: Overruled. He may answer.

Q. Mr. Rivers, you have filed in your report, on page 5, reference to cleaning up. Now, what was the condition that you found around the building after you went there, with reference to being cleaned up.

A. Do you want me to answer the previous question first?

Q. Yes. I thought you did. I am sorry.

Court: I would like to know when Mr. Rivers made his inspection. He said August 19th?

Mr. Rivers: August 19th and 25th.

Court: Of what year?

Mr. Rivers: 1952—of this year.

Court: All right. You may answer.

Mr. Bell: He had not answered the previous question—if that clause was ordinarily a clause used by engineers in Alaska? [460]

A. It is essentially a standard clause. The wording differs slightly, but the owners are to finish the work. That is in practically all contracts of this nature.

(Testimony of Victor C. Rivers.)

Q. Now, Mr. Rivers, when you went there to make these two inspections, were you familiar with GC-39, on page GC-10, which reads as follows: "Cleaning Up. The contractor shall, as directed by the engineer, remove from the owner's property, and from all public and private property, at his own expense, all temporary structures, rubbish, and waste materials resulting from his operations." You had read that before you went to the premises?

A. Yes, sir.

Q. Is that an ordinary and standard clause used in Alaska by professional engineers?

A. It is a standard clause for cleaning up building waste, rubbish and making the building clean.

Q. When you went there in August of this year, what did you find in relation to that cleaning up?

A. Well, there had evidently been very little, if any, clean-up work done. There was a considerable amount of debris at the south end of the building.

Q. You have referred to that in your report, on page 5, have you not?

A. I referred to that cleaning up clause. I refer to the clean-up not being done, on page 8 of this report. [461]

Q. What about the formation of the foundation walls, or the workmanship of the foundation walls? Did you examine them?

A. I examined the part above ground that was visible.

Q. What was the condition of those walls?

A. The concrete was fairly uniform in quality,

(Testimony of Victor C. Rivers.)

and there were certain cracks that may have been expansion cracks. The foundation walls had been touched up here and there, where they had porous spots, but the wall ties had not been properly broken off and removed, nor had the holes been welded. The concrete was in what we would consider more or less unfinished final form. The specifications do not call for any finished trowel service, but they do call for imperfections being troweled over and smoothed off.

Q. Would you call the work on that foundation good workmanship?

A. As far as I could see, the workmanship I could see above the ground appeared to be adequate for the purpose. I can't tell what was below the ground. I don't know the size of the footings they put in under the building.

Q. Was it finished up in a workmanlike manner?

A. No, it was not completed work.

Q. What about the floors?

A. I inspected the floors as called for in the specifications. It was a monolithic type of pour and the specifications, as I recall, called for a grade to the drains of $\frac{3}{16}$ th of an inch to the foot. The standard practice is to allow [462] one-eighth to one-quarter of an inch to the foot for this type of use. At the time I was there—it was a wet day the first time and the second time they had been washing cars in there—and there were some bad depressions in the floor—some as such as one-half to three-quarters of an inch deep, which were full of water, and instead of draining to the floor drain at two par-

(Testimony of Victor C. Rivers.)

ticular points, the grade was evidently in the opposite direction.

Q. What about the condition of the floor in the boiler room?

A. The floor in the boiler room, at the foot of the stairs, is low. It grades away from the drain about an inch and a half. It is lower where it should drain to the drain. Then, at the point of drainage, which is behind the boiler itself, there is about one and one-half inch differential in grade in the wrong direction.

Q. Then, would it ever drain if it was left to nature to take care of it?

A. No, it couldn't drain.

Q. Then the water would remain there?

A. That is correct, yes.

Q. Until it evaporated? A. Yes.

Q. What about the topping on this floor? Is there any place which is loose?

A. Well, along the front wall of the show room there is some [463] evidence of faulty concrete. It has been painted over now, but it is scaled off in a number of places. It could have been caused by the grade of concrete used or by freezing, but in places along the front show window, part of the floor slab surface has scaled off or given away.

Q. What kind of finish would you call the floor in the garage?

A. It is called a monolithic type of floor. That means where you pour your floor it is finished, while the whole slab is still wet.

(Testimony of Victor C. Rivers.)

Q. Is there trowel marks, and uneven places, over the greater portion of that floor?

A. Yes, the floor is a very rough finish job. It is not finished in accordance with proper grade or quality of workmanship.

Q. What is necessary to do to that floor of the garage before it would be in compliance with the plans and specifications?

A. Well, I would require that that floor be re-finished. Now, there's two or three ways it might be done, but if I were going to require that floor to be put in suitable condition, I would require that the top two or three inches of the floor be removed, and that it be refinished with concrete, and have it drain towards the drains.

Q. How do they do that, Mr. Rivers, in removing the top of this floor?

A. Well, that would have to be done with the use of machinery—[464] a compressor, a jack hammer or regular crushing machinery.

Q. Is that rather expensive work?

A. Yes, sir.

Q. Do the concrete floors in the show room comply with the requirements of the specifications or good workmanship?

A. There is a considerable number of trowel marks—rough finish there—there is some paint over it now and that tends to make it look a little smoother, but there are imperfections, especially along the front windows where, as I say, it is scaled off and has been painted over.

(Testimony of Victor C. Rivers.)

Q. Did you inspect the structural steel?

A. Yes, sir, I did.

Q. What did you find from your inspection there?

A. Well, I found the structural steel, as far as its erection goes, adequately complies with the plan.

Q. What about the painting of it?

A. I went over the steel in various places with a pocket glass, and I scratched the surface and found manufacturer's priming on the steel, and what appeared to be, upon microscopic examination, what appeared to be one coat of aluminum paint. The paint was very thin and there was no evidence, with a pocket glass, of any two layers of aluminum paint. I also inspected some of the connections. The specifications called for field connections, which are bolts or rivets or welds, to have a coat of red lead or two coats of other paint, and [465] selected by the owner. The connections I checked—five connections of that nature—I scratched them and found no evidence of red lead or any other rust resistant prime on those connections. There was, however, on those what again appeared to be one coat of aluminum paint.

Q. Did you find, Mr. Rivers, any which the paint has left the steel and it is now rusting?

A. Yes, I found some such places.

Q. Did you examine the masonry?

A. Yes, sir, I did.

Q. Would you tell the condition of the concrete in the blocks that were used there?

(Testimony of Victor C. Rivers.)

A. Well, I examined the walls above the foundation which were composed of pumice blocks; the specifications called for cinder concrete blocks. Those pumice blocks had been set in a rather high percentage of lime mortar—that is evident from the color of the mortar. What the exact percentages are, I have only heard what was testified here. It was also evident that some amounts of calcium chloride were used in the mortar at places. In these concrete walls the laying up of the pumice block has been done with considerable uniformity of joints, and the joints have been pounded in accordance with the specifications. The walls are fairly plumb and fairly true—they are slightly wavey, but not any more so than would be considered acceptable. There [466] seems to be fairly uniform pattern of grounding. The walls are cracked from the top down, and from the bottom up, at about 12-foot intervals on all walls. That would appear to me to be expansion and contraction type of crack. On the front wall, where a diagonal corner of the building takes off, there is definitely one large crack, evidently caused by some shifting of the foundation after the wall was built, at least by movement of the wall more than a temperature crack. Over the window on the south wall there is a concrete beam, and above this concrete beam are four-inch blocks, evidently, and in the next joint above that is an opening you can stick a pencil through—it is evidently caused by the beams separating.

Q. Did you examine the mortar to see whether

(Testimony of Victor C. Rivers.)

or not it had the appearance of having been frozen?

A. Yes, I did. It looked to me like in all probability that joint over the rear window had been frozen, but it is pretty hard to tell, with lime mortar. The specifications call for cinder concrete block and 1-3 cement sand mortar. They evidently used a larger percentage of lime. In my opinion, if this building was done under the temperature conditions that have been stated, the only thing that saved that concrete block at all is using lime mortar.

Q. Mr. Rivers, which is the stronger of mortars, if the weather was so it could be laid—that is, above 32 degrees? Would [467] the 1-3 mortar which, as I understand you to say, is one part cement and three parts sand, be weaker than the 1-1-6 mortar which you heard the witness testify was used?

A. Well, in a case like that, the cement mortar would make a rich cement mix, and you would get concrete that would probably yield about 4,000 pounds pressure to the square inch. The lime, up to 10%, will not reduce the strength of the mortar. We allow up to 10% lime with concrete mix to make it trowel better, but above that, lime does weaken the strength of the mortar. However, a good lime mortar is still acceptable for certain uses. It is used in setting brick almost exclusively, as you probably know.

Q. Now, you have referred in your report on the masonry, on page 6: "The concrete block masonry was inspected, and on the south wall, over the steel sash opening, the mortar was in a partially disintegrated state, and failed to make a satisfactory

(Testimony of Victor C. Rivers.)

bond with its adjoining concrete blocks. This section of the wall should be removed and relaid to conform to suitable workmanship standards." Now, Mr. Rivers, what do you mean by that, on page 6 there, would you explain that, please?

A. I meant those blocks immediately over the window opening on the south wall should be removed and replaced with proper standard of workmanship in order to be acceptable. The wall does have a hole in it, and the hole is of some [468] extent and it is not good workmanship. It is not acceptable.

Q. Is that in such a condition that, if we should have a rather definite earthquake and cause a tremor, as you have seen in Alaska in your years, what might be the result of that wall? Would it fall or would it not?

A. I am very doubtful if, under the tremors I have seen here, that that wall would fall. The building is a steel sketeton building and the walls only have to carry their own weight, and they are fairly well tied into the steel skeleton of the building with ties into the blocks every so often.

Q. What is the effect of the heat of the building by these holes in the wall? Does the heat go out through them or not?

A. Oh, yes, there is heat lost there, yes, sir.

Q. Now, with reference to the builder's hardware and miscellaneous metal. Tell us about the outside show room door—what did you find there?

A. Well, the builder's hardware is specified to be

(Testimony of Victor C. Rivers.)

brass hardware. I found the hardware in the outside doors to be brass plated steel hardware, including the door closer. They are already showing signs of rust and deterioration. It is installed loose, apparently, and not a good fit, and not up to an acceptable standard. [469]

Q. What about the kick plates?

A. There was kick plates called for, and push plates that was to be on both sides of the door. There is kick plates only, and no push plates. They have kick plates on only one side of each door.

Q. What is the condition as to the installation of the trimmings on these doors? Are they loose, or are they tight and normal?

A. You mean the jambs and casings?

Q. I mean the trim you have referred to as kick plates, and locks and knobs. Are they tight?

A. The kick plates are screwed on tight. The knobs are not properly adjusted—I believe they could be, with a little careful handling, made much more satisfactory in their operation.

Q. What about the inside door hardware?

A. The inside door hardware on the three different doors connecting the garage to the show room is not as specified. You have three doors, but the hardware called for two of those to be on an overhead track—a rollaway. There is no such thing there. It is just standard plain brass plated hardware of a rather average quality. Also, on the interior doors, which are installed in the partitions, they have some hardware. The locks and knobs and latches are very

(Testimony of Victor C. Rivers.)

loose, and I am not sure whether they were installed [470] under this contract we are speaking of or not, although Mr. Carr told me they were taken off the front doors and put back there. They are bathroom type hardware, not front entrance hardware.

Q. Were the materials and the workmanship on these inside doors, and the hardware, up to standard acceptable workmanship?

A. They are not in accordance with the specifications, and on that ground I would say they were not up to an acceptable standard.

Q. And is there any doors in there at all that were hung on the overhead tracks, as the specifications called for?

A. Well, the big overhead garage doors are both on overhead tracks.

Q. But I am referring to the inside doors in the partition?

A. No, none of those are on tracks with rollers.

Q. And the specifications—do they or do they not call for rolling doors, or sliding doors?

A. They called for two of those doors between the garage and the show room to be on an overhead track with suspended roller.

Q. I believe you stated they are not there at all?

A. That is not there.

Q. What about the two-way swinging door. Is there any two-way swinging door between the garage and the show room? [471]

A. No—might I elaborate on my answer? I do not recall if the plans or specifications called for

(Testimony of Victor C. Rivers.)

either of those doors to be double acting or a double spring door.

Q. But is there anything like that there?

A. No, sir, not to my knowledge.

Q. Now, what about the carpentry and mill work. Take the metal store front sash and metal factory sash. Would you please go into detail on that?

A. Well, I checked the plate glass and the store front sash. The plate glass appears to be of uniform size, but it doesn't fit the openings. I checked the size of them and the glass itself and it is apparently of a uniform size. However, the glass does not fit any openings provided for them, and in two places, along one side, there is a substantial crack, from nothing to one-eighth of an inch, and there is wooden shims in there to keep it from falling out. The metal sash itself, which is supposed to be the store front sash, is composed of two different types of material, evidently gathered from two different sources and installed with a good many hammer and tool marks on it, and it is apparently aluminum. It is what they call this weatherproofed aluminum, and they have used a small nail around the outside, an ordinary steel nail, which has now rusted. It is very, very poor workmanship. It doesn't fit the openings, and it is not accepted standard of [472] material for that use, and some of the stops on the inside of that glass have not yet been installed. They are still missing.

(Testimony of Victor C. Rivers.)

Q. What do the specifications require the backs of the jambs to be bedded in?

A. In the outer doors they are supposed to be bedded in white lead, according to the specifications.

Q. Are they installed that way?

A. No, there is no evidence that they were, and you can see in along the cracks for the full depth of the jamb in two or three places.

Q. Was there any lead between the window jambs and the concrete or block work surrounding them.

A. There is no evidence of it—none that can be seen.

Q. I wish you would explain what you mean by this: "The metal store front sash utilized in these openings is of a makeshift nature, consisting partly of extruded and partly of rolled sections."

A. Well, an extruded section is an ornamental piece drawn through an opening; another type of ornamental metal is rolled through rollers of the shape you want. They have used both of these on this front. It is not the same as manufactured provided for the installation, in that it is gathered from two different sources, and doesn't match well, and doesn't look well. [473]

Q. Does that come up to ordinary standards of good workmanship?

A. No, sir, I wouldn't approve it.

Q. You say, also, on page 7: "It has been poorly fitted and installed and shows tool marks and irregu-

(Testimony of Victor C. Rivers.)

larities not in keeping with acceptable workmanship." Would you please explain that?

Mr. Arnell: If your Honor please, the document is not in evidence and I think he ought to ask direct questions.

Court: Does counsel object?

Mr. Arnell: Yes.

Court: The objection is sustained. Counsel may invite the attention of the witness to a page and ask, that the witnesses' recollection may be refreshed. It is out of order, but it may be done.

Q. All right. Mr. Rivers, would you look at the third paragraph down, on page 7, starting with the word "metal", and would you explain what you mean by the statement in your report?

A. Well, that is essentially what I have just answered—that the metal store front sash is composed of two different types and poorly installed, and the sash doesn't fit the glass, although the glass is all the same size. They are neither uniform in points nor are they square. Secondly, the store front sash shows a lot of tool and hammer marks [474] and are nailed with ordinary wire nails which are now rusted, and it is not acceptable work. It is very rough.

Q. What about the next section down, commencing with the words "The factory type"?

A. Around the rear of the building they have used a steel sash, which is called industrial type of sash, and that is a steel frame which it fitted into the opening, and ordinarily, when they form around a window opening, they have a special kind of con-

(Testimony of Victor C. Rivers.)

crete block so the window goes together, and it is then fastened in two places. These industrial sash, around the south and the east walls of the building, are not well fitted. The openings vary in size and the sash themselves are loose, and they have been corked up with plastic corking which is very poorly put on and is a very sloppy job.

Q. Would you consider them a standard of workmanship, or below standard?

A. I would consider it below an acceptable standard of workmanship.

Q. Are those windows sufficiently anchored in that wall?

A. That I couldn't tell. I can say this—that there are two of them that are loose. Whether they are sufficiently anchored to stay there, although they are loose or not, I don't know.

Q. What about the electrical work referred to on page 7 of [475] your report, starting with the words "Marquee lighting——"?

A. I went over the electrical work and I noticed a number of small items in the building. For instance, the little cover plates that are ordinarily on an outlet or switch, in some instances are missing. And the marquee lightning—there is a recessed fixture which does not have either a bulb or directional glass cover on it, and the socket has not been connected. I couldn't tell whether it was a complete circuit or not, but there again the work has not been brought to a proper finish, and that would should be done before the electrical work is accepted.

(Testimony of Victor C. Rivers.)

Q. Now, the plumbing, Mr. Rivers, referred to on page 7, the second paragraph from the bottom?

A. Well, in regard to the plumbing, the specifications called for all manufactured new material, and the floor drains in the garage, I noticed them; they had a homemade cover on them—it's just a matter of steel plate punched. I asked Mr. Carr on the first trip how that occurred, and he said the original covers broke as soon as they were run over. The present covers are homemade and just ordinary pieces of sheet metal punched.

Q. What about the hot and cold water pipe installation?

A. The specifications called for the hot and cold water pipes to be given a coat of paint and then insulated in their entirety. The cold water pipes are not painted and are [476] not insulated, and I would say approximately one-half of the hot water pipes have been properly covered with insulation.

Q. Would that have to be done to make an acceptable job?

A. Well, under this contract and these specifications, it is so specified. I don't always cover the cold water part myself, but it is sometimes inclined to sweat if you don't cover it.

Q. And the cold water pipes were not covered at all? A. No, sir.

Q. I believe you said they were not even painted?

A. Neither of the pipes have been painted, that I was able to determine, anywhere.

(Testimony of Victor C. Rivers.)

Q. What about the heating, Mr. Rivers, referred to on page 8 of your report?

A. The heating authorized in the plans and specifications—in the front sales room there were four directional unit heaters, each one of which is shown as controlled by a thermostat. Now there are, if my memory serves me, there are two thermostats. The other two registers are controlled by a three-way switch—slow, medium, and high speed switch—and that is just a wall switch. There is a slight variation there from the specifications, and it may or may not have been accepted at the time that work was put in. In regard to the other parts of the work, it calls for insulation [477] and covering of the pipes. Now, in most cases they have been covered, but they have not yet been completed.

Q. Now, Mr. Rivers, would you please explain to the jury why the specifications called for four thermostats or, that is, one for each of this particular type of heater, and explain to them why the four thermostats are necessary to keep all parts of that room warm or taken care of evenly?

A. Well, there is considerable travel through that show room from the garage in the rear and also from the street, and my interpretation of the designer's idea would be, that as these doors open, it got cool in the corner toward the front door—I mean around that unit heater, and it was to cut in and run for awhile to keep this temperature uniform. That would not necessarily require the unit heater in the rear to operate at the same time. The

(Testimony of Victor C. Rivers.)

present installation, in part at least, defeats the intent under which that was originally planned.

Q. The way it is now, as I understand it, Mr. Rivers, one portion of the building cannot have additional heat to compensate for the greater exposure to cold, by opening of the doors and so on, without heating the parts that are already sufficiently warm? A. That is correct.

Q. How about the painting on the heating pipes? Has there been any paint on them? [478]

A. Well, heating pipes are ordinarily wrought iron or black pipes. Where they are going to be covered, I don't recall that these specifications called for any painting before covering. I did not see any evidence of painting having been done.

Q. Is it required, for good standard workmanship, to first paint those pipes before you put the covering over them?

A. No, it isn't. Many times wrought iron pipe comes from the factory with a coat of enamel on it, but not always.

Q. Mr. Rivers, have you estimated the cost of fixing this floor, the way you have described it, by taking out the top two or three inches of the floor, and then reinstalling them in a workmanlike manner—have you figured what it would cost to do that?

A. Yes.

Q. What would it cost?

A. I figured it could be done for \$1.00 a square foot, taken out and an additional floor put in.

Q. How many square feet are there in there?

(Testimony of Victor C. Rivers.)

A. 5,000—let me see, that's 50 by 100, as I recall—the building, is that correct?

Q. That's right.

A. Yes.

Q. Now, Mr. Rivers, what would it cost to go down in this boiler room and do what was necessary to fix that boiler [479] room floor? Would it be necessary to move the boiler and heating equipment, and all of that stuff, before the floor could be fixed?

A. No, I think if the low part were just built up to a suitable level it would serve the purpose.

Q. And would that necessitate breaking out part of the concrete to do a fair job?

A. No, I think it could all be filled in with new concrete.

Q. Fill the whole floor?

A. Well, it would just be at the foot of the stairs, not the whole floor of the boiler room—the foot of the stairs—if that were done it would run down into the floor drain.

Q. Mr. Rivers, how large is that boiler room, approximately?

A. The boiler room is about $8\frac{1}{2}$ by 10, probably.

Q. Mr. Rivers, what would be the cost of putting in, at the same time you are putting in the foundations walls, what would be the cost of putting in two walls like you observed as the north wall and east wall in the boiler room? What would be the approximate cost of installing those two walls?

A. The north and east walls?

(Testimony of Victor C. Rivers.)

Q. Of the boiler room. I believe you said that was 8½, less the stairway—

A. Yes.

Q. What would be the reasonable cost for installing those [480] walls five or six inches thick?

A. Are they six inches thick?

Q. I think they are four, but I was giving them the benefit of it.

A. Well, in estimating that, we ordinarily figure on form work at 50c a contact foot, that is, the form on each side and the cost of the steel and the concrete. The concrete purchased and placed probably could be put in there for about 40c a yard, and the steel for around \$1.30 a ton.

Court: While the witness is calculating this, we will take a recess. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 4:07 o'clock, p.m., recessed until 4:17 o'clock, p.m., at which the following proceedings were had:

Court: Without objection, the record will show all members of the jury present and counsel may proceed with examination.

Q. Mr. Rivers, you referred to windows and the openings in the front of the building being out of square and not fitting. If you were to make these openings in a workmanlike manner, would it be necessary to tear the wall down and rebuild it to make them correct? A. No. [481]

Court: The last question propounded was not

(Testimony of Victor C. Rivers.)

fully answered. Would the Reporter read the last answer?

Reporter: "Well, in estimating that, we ordinarily figure on form work at 50c a contact foot, that is, the form on each side and the cost of the steel and the concrete. The concrete purchased and placed probably could be put in there for about 40c a yard, and the steel for around \$1.30 a ton."

Q. Mr. Rivers, did you figure those two walls to be the one that is in the north end and the one in the east end of the boiler room?

A. Yes, I figured the forms at \$1.00 a foot, the steel, 30c, and concrete \$1.00—\$2.30 a square foot of wall space. Now, that wouldn't reflect the cost of the excavation or backfill—just the wall itself.

Q. How thick a wall did you figure?

A. I figured on the basis of an eight-inch wall.

Q. Would you tell us how many dollars it would normally cost, ordinarily cost, to put those two walls in?

A. Well, I didn't quite follow the size of the wall.

Q. I think the wall is eight feet high, I believe, and the size you mentioned—

A. About 10. I don't have the exact size in mind—approximately eight feet high—that would be 80 square feet on one wall, and about 68 square feet on the other.

Q. Well, now, on that 148 square feet, what would that cost [482] normally to put that wall in?

A. Roughly, around \$340.00.

(Testimony of Victor C. Rivers.)

Q. And what part of that \$340.00 would be steel rods?

A. I figure that wall would require approximately two pounds of steel per square foot, and figuring this steel actually in place, at 15c a pound, it would be 30c a square foot.

Q. For 148 square feet? A. Yes.

Q. And if that rod was not used, then the wall would be that much cheaper, is that right?

A. Well, you would hardly dare put it in there without steel because the weight of the backfill would cause the wall probably to fail—at least it would not be a safe wall without it.

Q. And if this one is built without steel, then it would be your opinion that it is not a properly built wall? A. That is correct.

Q. Then about \$44.40 of that wall would be for steel, and the rest would be forms and concrete, and so on? A. That is correct, yes, sir.

Q. So it would be a little less than \$300.00 if it develops that the steel had not been used in the wall? A. Yes, that is correct.

Q. Now, Mr. Rivers, you spoke of raising the floor at one side of the boiler room so that you could make the water drain [483] back toward the drain in the floor. If you did that, would the fire door interfere?

A. Yes, the fire door would either have to be raised or cut off; the fire door is a metal covered door called a calmine type door. That type of door has wood with metal over it to resist fire—probably

(Testimony of Victor C. Rivers.)

four or five hours—it would have to be cut off or raised whatever amounts you raised the floor under it.

Q. What amount would have to be cut off that door?

A. Probably an inch and a half—maybe two inches.

Q. Mr. Rivers, what would be the over-all cost, or what, in your opinion, would be the estimated cost of fixing that boiler room so that the water will drain into the regular drainage pipes?

A. That is a pretty hard question to answer with any accuracy, but I would say that \$125.00 to \$150.00, round figure, would cover the cost of doing that work.

Q. Now, after you got that done, would you have what would be known as a patched up job?

A. Well, it would be prima facie a patched up job.

Q. Yes. Now, Mr. Rivers, you have referred to the windows being loose in the wall around the openings in the back wall. What should be done there to fix that wall up?

A. You mean the block over the windows?

Q. Yes. [484]

A. Well, I believe that a portion of that block over the concrete lintel beam should be removed and replaced. It is possible to wedge block up a crack—put some dry mortar in there—but I wouldn't think that would be a very good patch.

(Testimony of Victor C. Rivers.)

Q. In your opinion, it needs to be torn down and rebuilt?

A. That section over the window, yes.

Q. What, in your opinion, would the repair of that south wall cost?

A. That's pretty hard to say. New concrete block in place now is being set with the blocks bought, and the mortar furnished, and the labor furnished, for around a dollar and \$1.50 a square foot of wall space. If you have a large quantity, you can cut it to \$1.40 to \$1.45 for a small quantity of wall. This could not be considered in the class of new work, but would cost considerably more than that per square foot. I would say, to remove the old block and put in new block, or replace the existing block, a person should figure around \$3.00 per square foot.

Q. About how much of that wall should be torn down and rebuilt to make it practical, and stop waste of heat and so on?

A. Probably 30 square feet, removed and replaced, would be enough.

Q. That could be done, you think, for about \$90.00 or \$100.00?

A. I do. [485]

Q. What about re-setting of the windows in that wall. Would they need to be re-set?

A. No, I think they should be firmly secured and anchored.

Q. Can that work be done by concrete men, or would it require the work of a carpenter to handle those windows under union customs?

A. If I were going to repair those windows and

(Testimony of Victor C. Rivers.)

anchor them in place, I would remove the plastic and put in dry mortar and taper it off. I believe that a concrete finisher would be the man who would have to do the work.

Q. What about the east wall that is cracked. How can those cracks be repaired without tearing the wall down, or can they be repaired?

A. That question I have given some thought to—and those cracks appears to me to be temperature cracks. The biggest cracks, and most of them, appear to occur at the top half of the wall. It would seem to me that due to expansion and contraction, and the greater heat at the top on the inside, and the cold on the inside, probably caused those cracks, and they go down straight about 12 feet. The pattern indicates there is a temperature shrinkage. They go right through the joint and the block. They are not stress cracks. A stress crack in concrete walls follows the mortar joints. I might say here that pumice blocks are not made to any accepted or approved standard. [486] We never specify them, and if I have anything to say about it, we will never use them because there is nothing known about what shape they are. It is my opinion that expansion and contraction of this wall has caused these vertical cracks to appear and it is noticeable that near the roof or ceiling of the building, where the greater heat is, the cracks are greater. Whose responsibility that would be is a question beyond my knowledge. It might be an inherent characteristic of the material itself.

(Testimony of Victor C. Rivers.)

Q. Would the laying of this block in freezing weather have some tendency to soften the mortar and make them less firm and cause them to crack?

A. I have scratched the mortar, and the mortar does not have the strength of a cement mortar. As I said before, if you use a substantial amount of lime, those walls could be laid in cold freezing weather, with the proper method worked out. Ordinarily, you heat the block and you heat the sand and you heat the water, and you mix it altogether, and then the inherent heat in the block will stay long enough so that you can cover them. Then they have another canvas they use, or blast heaters, and they can protect them and they can be laid in cold weather—but improperly protected, you have a good chance of failure of your material.

Q. Mr. Rivers, the specifications require that that be laid in no weather colder than 32 degrees, and that they not be [487] exposed to cold more than 32 degrees for four days, I believe it is, or 48 hours, possibly, after being laid. Now, does that wall have the appearance, from what you have examined of it, of being laid in cold, bad weather?

A. Well, from the appearance of the wall, that cannot be determined.

Q. What about the specifications with relation to the fire wall, Mr. Rivers, across between the show room and the garage? Is there any fire wall in there?

A. Well, my inspection indicated a frame wall there covered with, it could be called a fire wall.

(Testimony of Victor C. Rivers.)

It's covered with asbestos board. Whether only one layer or not, I don't know.

Mr. Bell: I believe you can take the witness.

Cross Examination

Q. (By Mr. Arnell): Did you say you had examined the building on two different occasions, Mr. Rivers?

A. Yes, on the 19th and 25th. I have gone by it a number of times, but not to stop and examine it closely.

Q. Mr. Bell has asked you about the cleanup?

A. Yes.

Q. Did you testify that there remained considerable cleanup work to do?

A. I testified that there remained a number of truck loads of [488] debris on the south end of the building—construction debris. I did not state beyond that, I don't believe.

Q. Do you know whether that debris was there at the end of the job, or whether it is the result of some recent activity?

A. No, I can't say when it was there—parts of concrete block, small pieces of concrete and mortar—construction debris—possible six or eight yards—two piles.

Q. There is one pile in the rear of the building, is there not?

A. That is the pile I refer to.

Q. Is that the only cleanup work you refer to in your testimony?

(Testimony of Victor C. Rivers.)

A. That is the only cleanup work I refer to.

Q. Approximately how long would it take to clean that up?

A. Well, it is not big enough to bring a piece of equipment in there. I would say it would probably cost about \$4.50 a yard to take it out of there—possibly six or eight yards.

Q. Not in excess of \$35.00, probably to remove that?

A. Probably not.

Q. Now, you have testified in regard to the foundation walls. Did you testify to the effect that you examined only the part above the ground?

A. Yes, I examined only the part above the ground, except in the boiler room. I was talking about the outside at that [489] time.

Q. Did you examine the west wall, the south wall, and also the east wall?

A. Yes, sir.

Q. Did you know at the time you made the examination that a portion of both of those walls—the west and the east wall—had been installed a year prior?

A. I knew there had been some extra work done—what part I didn't know. I was inspecting the condition of the work as I found it.

Q. Were these conditions you referred to in the old portion of the wall?

A. Well, I don't know exactly what the old portion was. I can tell you where the conditions are on the west wall. The wall ties had been left in naked and unmounted. On the south wall the same condition was true, and particularly noticeable in the

(Testimony of Victor C. Rivers.)

beam over the rear windows. On the east wall the ties had been cut—apparently broken off—but most of the holes had never been filled. There was some evidence of a small amount of troweling on that wall, but many of the tie holes had not been properly filled. In the front wall, which is diagonal and a square wall, there was some evidence of some troweling done there, and the holes were apparently filled up.

Q. Now, this type of work that you have just described to the [490] jury, Mr. Rivers, ordinarily is regarded as finish work, is it not?

A. It is finish work, yes, sir.

Q. That would be within the last 5 or 10% of the amount withheld on the contract, would it not?

A. Well, I think that would cover it, yes, if it is not too expensive. Some types of outside finishing on large structures runs into a great deal more than 10%. In this case it would definitely cover it.

Q. This contract was \$38,450.00. Do you think it would take \$3,800.00 to finish the work you have just described?

A. You mean to put the building in acceptable condition, including all the finishing?

Q. No, we will get around to that later.

A. Yes, I think you could easily do what little I have described within the limit of \$3,800.00. That is just cleanup and outside finish of the concrete.

Q. How much do you think it would cost—1% minimum?

A. Well, it's pretty hard to say. I think 1%

(Testimony of Victor C. Rivers.)

would probably cover it for what part we have now described, and I want to limit it to that part we have described—cleanup and outside finish of the concrete walls.

Q. Finishing the outside portion of the building, breaking off the snap ties, and repairing these things you have described to me, and also described to Mr. Bell? [491]

A. 1% would do the work we have talked about—finishing the concrete outside and removing the debris. It would definitely not do the block work we have talked about.

Q. I didn't intend it should include that, Mr. Rivers. In your closing testimony on Mr. Bell's examination, you referred to these cracks. Would those be the obligation of the contractor or the owner?

A. Well, I don't know just how they got the pumice block in this contract. The specifications called for cinder block and they called for 1-3 cement mortar—cement and sand mortar. Now, we find the building down there composed of pumice block, using a cement lime sand mortar. How, just how they arrived on the adjustment on that, or agreement on it, I don't know.

Q. Do you know whether or not, under this contract, Mr. Carr was to furnish pumice block?

A. I read in the first part of this specifications that a considerable number of block were on hand, and they were pumice block, according to that statement. I assume the owner furnished them.

(Testimony of Victor C. Rivers.)

Q. That is the usual procedure in a case like that, is it not, Mr. Rivers?

A. I believe so, yes, sir. I believe it was something he had furnished, and was in addition to the actual contract price. [492]

Q. Under the terms of an ordinary contract, Mr. Rivers, where the owner furnishes the type of materials to be used in the construction, the contractor is ordinarily not responsible for the quality of material used, is he?

A. That would be my interpretation.

Q. Unless there was some faulty workmanship somewhere? A. Yes.

Q. So if there is a failure of blocks by reason of cracking, then, that wouldn't be Mr. Gothberg's responsibility, would it?

A. Failure can occur in many ways. If it is an inherent characteristic of the material it wouldn't be his responsibility.

Q. Did you testify, Mr. Rivers, that the cracks, in your opinion, particularly those towards the top, were temperature cracks?

A. I believe they are.

Q. Would those cracks result from the nature or quality of the pumice blocks?

A. Well, now, if you knew the contraction or expansion of pumice blocks, he could provide proper expansion joints. We always do that in concrete block walls, or concrete walls. Concrete expands in accordance to each degree of temperature change, 67-ten millionths of an inch. In other words, for 15

(Testimony of Victor C. Rivers.)

degrees temperature change, a 1/100th foot piece of steel [493] will change about one-eighth of an inch, so if you have 100 feet of steel change from 50 degrees to 75, you have expansion about one-eighth of an inch. The same is true of concrete, so ordinarily, if we knew what this pumice block expanded and contracted, we would know how far you can go without putting in an expansion joint; but there is no criterion on which we can judge. There is not enough information available.

Q. Would these temperature cracks be the responsibility of the owner of the building, or the contractor, where the owner had furnished the block, or specified that that be used?

A. Well, all things being right in the manner of laying the blocks, the quality of the workmanship—I would say that definitely it was the responsibility of the person who furnished the material. Now, it is hard to say what part of this failure is caused by the laying in cold weather, and what part is caused by the physical characteristics of the block. I wouldn't care to try to distinguish.

Q. Mr. Rivers, when you went down to examine the floor, did you use an instrument on it, or merely observe the condition of it?

A. On my first visit there were puddles on the floor as deep as three-quarters of an inch. There is no better instrument than that to determine where you have a sag or low spot. [494]

Q. Would you tell, Mr. Rivers, where the water stands three-quarters of an inch deep, please?

(Testimony of Victor C. Rivers.)

A. The deepest spot is right at the end of the washmobile—right at the northwest corner of the washmobile.

Q. You say that's three-quarters of an inch deep?

A. Well, when the water is standing—I didn't measure the depth. I only estimated it.

Q. You only estimated it? A. Yes, sir.

Q. How large is that puddle or pool?

A. About as big as that second table in front of you. There isn't only one pool—there is a number of depressions, and there is another location under the hoist where there is considerable depression—I noticed that as well.

Q. Did you testify that, under your understanding, the grade of this particular floor was established at three-eighths or three-sixteenths of an inch to a foot?

A. I'm not entirely sure in my memory, but it seems to me it was three-sixteenths in the specifications. I could confirm that quickly.

Q. Did you testify that the standard varied from one-eighth to one-quarter of an inch per foot?

A. That is correct. We bring it in one-eighth for a ways, and as it approaches the drain, we like to break it down to a quarter. [495]

Q. How many floor drains are provided for in the specifications, Mr. Rivers?

A. I would have to look on the blueprints. I don't remember. I believe that there is three showing there now.

(Testimony of Victor C. Rivers.)

Q. Do you recall where the original location of the washmobile was, according to the plans?

A. No, I don't, and I don't believe the original location was indicated on the plans.

Q. Do you know whether or not the location of the washmobile was changed at any time?

A. I understand it was, but I, of my own personal knowledge, do not know that it was. I have heard hearsay to that effect.

Q. Do you know whether or not the type of hoist was also changed? A. No, sir, I don't.

Q. Would the bracing underneath the two hoists make any difference in the grade of the floor with respect to drainage?

A. I don't believe the blocks there would affect the proper grading of that floor. If it were properly laid and properly finished to grade, I don't see why it should.

Q. Where are the drains located, Mr. Rivers?

A. There is one drain located close to the south wall about midway of the building. [496]

Q. Is that directly in front of the 12 by 12 door?

A. Not quite—pretty near, but not quite. A little off to the west, then along the west wall, at the car hoist, or near the car hoist, there is another floor drain. And then there is a third one back on this other side. I don't recall exactly where it was, but those were the three that I referred to.

Q. Is there any drain where the present washmobile is situated?

(Testimony of Victor C. Rivers.)

A. Not right under the washmobile.

Q. Where is the closest drain?

A. The one on the south wall I just described.

Q. Is there one on the south wall?

A. Not on the south wall, but away from the south wall and about midway.

Q. If the floor is out of grade, Mr. Rivers, do you know how much?

A. Well, to be in grade, the floor should slope to the drains approximately $\frac{3}{16}$ th of an inch to the foot. Now, in some cases, the floor slopes away from the drains and causes puddles to lie there. It could easily be three-quarters to half an inch out of level in a number of places.

Q. Mr. Rivers, if you owned that garage, would you go to the expense of spending \$5,000.00 to remove those puddles?

A. No, sir, I wouldn't.

Q. In other words, you would continue to use the floor as it [497] is?

A. I wouldn't accept the floor from somebody building it without their replacing the floor to a standard that is acceptable.

Q. Did you testify that you would remove two or three inches of the top surface?

A. Yes, I would take off enough so I could get a good substantial thickness of concrete for re-finishing it, and lay a wire mesh—chicken wire mesh. There could be other solutions, but that would be the most economical.

(Testimony of Victor C. Rivers.)

Q. How many yards of concrete would be in that floor as it is laid?

A. I believe the floor is laid at six or seven inches—I am not too sure.

Q. Let's take six inches.

A. How many square yards, or cubic yards?

Q. I don't know.

A. Which did you ask me?

Q. Cubic yards.

A. There is just slightly less than 80 cubic yards in the floor if it is six inches thick.

Q. When you refer to cubic yards, Mr. Rivers, do you refer to the type of yard that Anchorage Sand and Gravel delivers? A. Right.

Q. In other words, they deliver cubic yards?

A. That is correct—cubic yards.

Court: I think we will suspend. You may step down. The trial will be continued until tomorrow morning at 10:00 o'clock and in the meantime, ladies and gentlemen of the jury, you will remember the admonitions of the Court as to your duty and the Court stands adjourned until 10:00 o'clock tomorrow morning.

Whereupon at 4:55 o'clock, p.m., September 30, 1952, the trial of the above entitled cause was continued until 10:00 o'clock, a.m., October 1, 1952.

Be It Further Remembered, That at 10:00 o'clock, a.m., October 1, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present

(Testimony of Victor C. Rivers.)

as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: The witness may resume the stand. Counsel may proceed with examination.

Q. Mr. Rivers, I have handed you Plaintiff's Exhibit 3, which is the layout of the foundation and walls, and I will ask you this: If that was the only plan at the time that was available when the first contract was signed in this case, what would be the scope of the contractor's work, based on that plan? [499]

A. If this were the only plan, without any supporting plans?

Q. Yes.

A. Well, I would assume that this front wall foundation, and the moving back of the rear wall, would be the scope of the work under this one sheet. I say that because there are heavy lines shown for apparently new construction. I assume that was the understanding.

Q. Based on that drawing, how deep would the foundation be, including the foundation footing?

A. That would be three feet, plus one foot—four feet to the bottom of the footing in all cases.

Q. Now, under common construction practice, if later work were added to that, would that be extra, in addition to the foundation work required on that plan?

(Testimony of Victor C. Rivers.)

Mr. Bell: I object—that is not proper cross examination. It has not been gone into at all.

Court: Overruled.

Mr. Bell: Exception.

A. If there is any doubt of a firm foundation, the specifications generally say you should go down to a firm foundation.

Q. If, later, a basement were constructed, Mr. Rivers, would that be in addition to the work required under this layout?

A. Yes, that definitely is not shown on this plan, and would be additional to this plan, if this is the only plan.

Q. Mr. Rivers, when a plan like this is dated, is it given [500] the date that it is drawn or the date that it is printed?

A. It is generally given the date that the plan or a tracing is approved—the day it is finished and approved. Sometimes you will find both the date that the drawing has been finished, and also the date as approved by the owner.

Court: Counselor, this matter is entirely new. While I don't want to be too technical, particularly in the case of an expert, I think you will have to consider the witness as your witness.

Mr. Arnell: Mr. Bell went into the foundation yesterday, and he listed certain information. I am laying this as foundation for my cross examination.

Court: What was that? What did Mr. Bell go into yesterday?

Mr. Arnell: The additional cost on the basement,

(Testimony of Victor C. Rivers.)

and he arrived at the total cost of approximately \$300.00 for the construction of the basement. I am laying this as foundation to go into the cost of the foundation, which Mr. Rivers has testified would be an extra, if this were the only plan available to the contractor at the time the first contract was let.

Mr. Bell: Your Honor, you will remember all I asked him about was the two walls to the boiler room. I never mentioned any additional work on the basement at all.

Mr. Arnell: Counsel can't limit the scope of examination by asking in regard to two walls. When he brought out the [501] question of the basement he opened up the whole field.

Court: You may continue your examination and, if necessary, the jury will be instructed as to whether it is direct or cross. It really makes very little difference.

Q. Yesterday, Mr. Rivers, I believe Mr. Bell asked you a question about the boiler room and two walls, one of which was 8 feet, and another of which was 10 feet? A. Approximately.

Q. Did you not then testify that the cost of those two walls would be approximately \$340.00?

A. I testified that an 8 inch wall would cost \$2.30 a square foot of wall, exclusive of excavation and backfill.

Q. Now, Mr. Rivers, would it not also be necessary to extend the depth of the foundation—that is, the outside walls—deep enough to provide addi-

(Testimony of Victor C. Rivers.)

tional concrete or cement walls through the full depth of the basement all around?

A. That is correct.

Q. Did your computation yesterday take that factor into account?

A. No, sir. My computation was merely the cost per square foot of reinforced 8 inch wall.

Q. For the two designated walls?

A. The two we discussed were those 68 square feet and 80 square feet.

Q. How much deeper, Mr. Rivers, would it be necessary to extend [502] the two outside walls?

A. That present foundation wall is three feet deep, exclusive of the footing, and if the boiler room is 8 feet, which it is approximately, it would be necessary to extend the outside wall an additional depth of five feet.

Q. Would that be necessary all around the outside wall?

A. No, that would be necessary only on the west and the south side. That would be the wall across the end of the west wall of the boiler room.

Q. Are you able, Mr. Rivers, to estimate the cost of the excavation which would permit the construction of the type of basement that now exists?

Mr. Bell: Object as improper cross examination.

Court: Overruled. You may answer.

A. The excavation—the yardage wouldn't be great, but to bring in equipment and do it, it would take at least a day's time—and it would probably

(Testimony of Victor C. Rivers.)

cost, with the normal equipment in this town, around \$150.00 for that excavation.

Q. Now, are you able to estimate what the probable cost of the backfill would be for the basement?

A. Well, there would be two costs there—the cost of removing the excavated material, and the cost of using what was necessary to backfill around the walls, and I would say that it would probably cost in the neighborhood of \$50.00 for that operation. [503]

Q. You mean for the cost of removal, plus backfill?

A. They would spread the excavated material in the general area and then backfill around the walls. That is a rule-of-thumb estimate, however.

Q. When you answered Mr. Bell's questions yesterday, Mr. Rivers, you arrived at approximately \$2.30 a square foot of wall space. Did you figure in the cost of plywood forms, including the framing?

A. Fair costs for estimating purposes are generally figured so much per contact foot, and ordinarily when you use plywood forms, you reuse the plywood often. In using shiplap forms, you can use 75 per cent of the shiplap. You figure the cost at 50c a foot per contact foot—two feet for every foot of wall—two on each side, and that is \$1.00 for forms in that calculation.

Q. Then the balance of this \$2.30 figure was for concrete, I presume, and steel?

A. I calculated two pounds of steel per square

(Testimony of Victor C. Rivers.)

foot, and that was 30c, and the concrete was calculated at approximately \$40.00 a yard, and that was \$1.00.

Q. Are you able, Mr. Rivers, to estimate the cost of the stairway or stairwell?

A. Which do you mean—stairway or stairwell?

Q. Well, both of them together.

A. Roughly, I could estimate it—yes. [504]

Q. What would you estimate it?

Mr. Bell: Your Honor, object to that on the same grounds. It is not proper cross examination. It never was gone into yesterday.

Mr. Arnell: You went into the boiler room, and that's part of it.

Court: Overruled.

Mr. Bell: Exception.

A. Do you want an estimate of the stairway and the stairs?

Q. Yes.

A. I would say the stairwell—I would say \$2.00 a cubic foot for the enclosed area, and it would be 240 cubic feet for the area included in that stairwell. That, at \$2.00, would be \$480.00 for that particular part.

Q. Would that, Mr. Rivers, include the concrete wall that runs down along the stairway between the boiler room—in other words, where the fire door—

A. That would include the enclosed area. The wall on three sides and the stair down.

Q. Now, what would be the approximate cost, Mr. Rivers, of the additional wall on the west side?

(Testimony of Victor C. Rivers.)

A. Exclusive of your excavation, again that is an 8 inch wall, and it has about the same steel I quoted on the other 8 inch wall, and about 230 square feet of wall space.

Q. In other words, if it were $14\frac{1}{2}$ feet, it would be approximately [505] five feet deeper, would it not? A. Yes.

Mr. Bell: Object to the question. He says $14\frac{1}{2}$ feet and the witness has already testified it was $10\frac{1}{2}$. It is confusing.

Mr. Arnell: That is the inside wall, Mr. Bell.

Court: Overruled. The witness will know whether there has been any misstatement of his testimony. What was it you said in that connection, Mr. Rivers?

Mr. Rivers: I said the boiler room was approximately $8\frac{1}{2}$ by 10 feet—approximately an 8 foot ceiling.

Court: All right, counselor.

Q. What would be the cost of the extra depth of the outside wall, then, Mr. Rivers?

A. 5 by 14 feet—

Mr. Bell: Object to calculating it on 5 by 14. The witness has informed him it was only $8\frac{1}{2}$ by 10 feet.

Court: Overruled.

Mr. Arnell: I will get the plans, your Honor. Maybe that will clarify it.

Q. Mr. Rivers, I have handed you Plaintiff's Exhibit 4F, which is the layout of the basement and the stairway? A. Yes.

(Testimony of Victor C. Rivers.)

Q. Would the answer you have previously given in regard to the stairway and stairwell include a portion of the west [506] wall to the width of the basement or the steps, or would it not?

A. No, it would not include the width of the steps. It would merely include the 10 foot width of the boiler room.

Court: What does the plan show as to the size of the boiler room?

Mr. Rivers: They show the inside dimensions at 10 feet width and 12 feet deep.

Q. Will you state, Mr. Rivers, what the over-all width and breadth of the furnace room, including the stairway, is?

A. Including the stairway, the over-all width inside is 15 feet 8. The over-all depth is 12 feet inside dimensions.

Q. What are the outside dimensions?

A. The outside dimensions on the width are 17 feet, and 13 feet, four inches.

Q. Would it be faster, Mr. Rivers, if you just sat and made a computation of the cost based on those plans, or if I ask you questions?

A. The cost of the boiler room and the stairs?

Q. Yes, and the additional foundation depth on the west and south walls?

A. Well, it would be faster to make a computation of the whole area. I can give you a round figure estimate of the cost.

Q. Without a computation, or with it?

A. No, with the computation. [507]

(Testimony of Victor C. Rivers.)

Mr. Arnell: I think perhaps, your Honor, it might save time and speed this thing up if we could do it that way.

Court: How long would it take to make a computation?

Mr. Rivers: About 10 minutes.

Court: The Court will stand in recess for 10 minutes, and the jury will remember the admonitions of the Court as to duty.

Whereupon the Court at 10:30 o'clock, a.m., recessed until 10:40 o'clock, a.m., at which time the following proceedings were had:

Mr. Bell: Your Honor, before the witness answers the question, I will renew my objection and call your attention to Exhibit BCG 5. In the general building it shows that the stairway was a part of the general contract and no part of the extras, and it has been testified to that all the way through. We are confusing the issue here and it could not do any good because his contract for building that stairs is in the general contract. It is not an extra at all and it was never claimed to be an extra by anybody. They are having Mr. Rivers figure a bunch of things that are confusing to the jury.

Mr. Arnell: I think, your Honor, Mr. Bell's statement is a little false.

Mr. Bell: Well, I can show it to you.

Court: Please don't use the word false.

Mr. Arnell: Excuse me—incorrect, because it says fittings, [508] foundation walls, boiler room walls are in place. When Mr. Bell says—

(Testimony of Victor C. Rivers.)

Court: Wait a minute. I think I shall not go into any further argument at this time. At the end of the trial counsel may bring it up upon request for instructions or otherwise. The objection is overruled. The jury will listen to the evidence and, unless instructed otherwise, will consider it.

Mr. Arnell: If it is any inconveniece to the Court or jury, we could make Mr. Rivers our witness.

Court: I am going to instruct the jury upon that. When counsel for one party, on cross examination, goes beyond the scope of cross examination, then the witness is a witness of the party who goes beyond the scope of cross examination. It is not presumed that the witness tells the truth for one party and not for other parties.

Q. Mr. Rivers, have you arrived at a computation? A. Yes, sir, I have.

Q. Would you state to the jury what your computation includes?

A. Well, for the cost of building the boiler room of the size shown on the plans, less the amount of work already included in the foundation walls. I estimate the boiler room itself, without the stairway, would cost \$1,844.00. And I estimate the cost of the balance of work in the stairway—I said originally, it would cost \$480.00, but deducting the work that was done already, the balance on the stairwell [509] and the stairs would be \$342.00, so for the total work of the boiler room and the stairway, I estimate an amount of \$2,186.00 would be an average cost

(Testimony of Victor C. Rivers.)

figure. That would include excavation, backfilling, concrete forms, steel, and all work in those two areas.

Q. That would also include the contractor's profit, would it not?

A. It would include the cost to the owner.

Miss Wise: May I ask a question? What's the difference between stairway and stairwell?

Mr. Rivers: The stairwell is the whole opening and the stairway is the actual stairs. The stairway is actually the steps and the risers. Oftentimes you have to distinguish between the two, because there is different ways at arriving at costs.

Mr. Boward: May I ask the witness whether he calculated the figures on the cost of construction as of today, or two years ago?

Mr. Rivers: I used \$2.00 a cubic foot of enclosed space in both the boiler room and the stairwell and stairs.

Court: The question is whether that is the present cost or the cost of a year and a half or two years ago—not what was included—but as to whether it is present cost or cost when it was built.

Mr. Rivers: It would be my estimate at the present time. [510] It might vary as much as 10 or 15 % over what it would cost two years ago.

Court: It would be lower two years ago?

Mr. Rivers: Yes.

Court: Counsel may proceed.

Q. As we recessed yesterday, Mr. Rivers, I asked you a question regarding the cubic feet or

(Testimony of Victor C. Rivers.)

yards, rather, of concrete that would be required in the repair or rehabilitation of the garage?

A. Yes.

Q. Now, did you testify yesterday that it would be your recommendation that two inches of the surface of the present floor be chipped off?

A. Yes, I testified that, in order to bring the floor up to a proper grade and still have a good sound floor, that I would remove the top two to two and one-half inches, and then replace it with wire mesh—reinforced material.

Q. Do you recall how large the show room is, Mr. Rivers?

A. Not without looking at the plan.

Q. You have the other set there. Could you turn to the one that shows the floor layout. Perhaps I could rephrase my question. Mr. Rivers, what is the distance between the front wall of the building and the partition that separates the shop and the whole show room, including the offices?

A. Well, it is approximately 32 feet. It's more than that— [511] just a moment—approximately 32 feet.

Q. Do you recall any provision for drainage in the show room at all? A. No, I don't.

Q. Do the plans show any?

A. This floor plan does not. I better look—it definitely does not show anything in the show room, no It doesn't show anything on the floor plan except—no, this is in the garage part—nothing in the show room.

(Testimony of Victor C. Rivers.)

Q. Would it then be necessary to carry out the rehabilitation in the show room, as you have described, with reference to the floor of the shop?

A. No, a very small part of the show room would have to be rehabilitated—a small strip across the front wall only.

Q. Do you think, in its present condition, that it is serviceable, Mr. Rivers, for the life of the building? A. Yes.

Q. In other words, it would not be absolutely necessary to tear out the concrete in the showroom in order to——

A. No, I don't think it would, except for the part that has been frostbitten across the front. I think that should be smoothed off and leveled off.

Q. When you say smoothed off, do you mean just refinished or removed?

A. You would have to remove it to get a thick enough layer so [512] it wouldn't chip out—enough so it would be part of that slab.

Q. Then, upon the basis of your testimony, it would be your recommendation that the portion back of the partition—that is, the entire shop area—be resurfaced, is that correct? A. Correct.

Q. You testified yesterday it would take \$5,000.00 to rehabilitate the whole garage floor?

A. That was my estimate of the entire floor at \$1.00 a square foot—for removal and replacement.

Q. That included the 50 by 100 building?

A. That is correct—the whole floor area.

Q. Why would you chisel off, say roughly two

(Testimony of Victor C. Rivers.)

inches, Mr. Rivers, and then lay wire mesh and then resurface?

A. Because, in some places, if you just laid it over the present floor, you would have such a thin layer of new concrete it would scale and chip. You would have to go deep enough so that over the whole floor you would have good material—have enough thickness and body to make it satisfactory—to resist weather and any weight that went on it. This has been used quite a bit and I would recommend not less than two inches be removed and replaced.

Q. Would it not be just as feasible to lay your wire mesh over the entire floor and pour an inch or two over the [513] existing concrete, provided it was cleaned properly?

A. It would have to be cleaned and roughed up so you could get a bond.

Q. Could that be done as easily as the way you recommended?

A. Your bracing, hoist and the drains and other things would have to be adjusted in height. Your hoist would have to be adjusted in height. Anything that was set in the floor would have to be adjusted to the new floor level.

Q. Mr. Rivers, would you say that the existing floor compares favorably with average construction?

A. No, it is sub-standard, in the sense, not of the quality of the material, but of the handling and placing and finishing of the material. I have

(Testimony of Victor C. Rivers.)

said that before—that it is not an acceptable standard of work.

Q. Could the change of location of these various pieces of equipment have any effect on the present location of the floor?

A. It shouldn't have. The floor is a separate item over the equipment, and the floor should be laid properly and to the grade specified within reasonable working limits.

Q. Based upon your testimony this morning, Mr. Rivers, that it would not be necessary to remove all of the show room floor, what would be the result, so far as the price is concerned, if you just repaired, according to your testimony, the rear of the building? [514]

A. I would say that it would lower the price of doing that work approximately \$1,500.00. That is the amount of square feet of floor space in the show room.

Q. Mr. Rivers, is this drainage condition that you have testified to, one that is common to the whole floor, or do these pools collect just in certain areas?

A. Well, I observed the pools in certain areas, and I also observed the floor being rough to a condition where I believe you would have to check the whole floor to see whether the whole floor needed taking out. From an observation with the eye, it is rough enough so I believe it should all be resurfaced.

Q. Did you say that you had not checked at all?

(Testimony of Victor C. Rivers.)

A. I checked the areas of work, where there was water standing. I was over the whole floor, but I did not see how deep the depressions were. The parts that were wet at the time did show the depressions there, and the low spots very well, and they were far below where they should have been, as much as three-quarters of an inch, as I have said.

Q. On the date of your last examination, how many pools of water did you observe standing on the floor ?

A. The date of the first examination—it was a wet day and they were working in there and I can state that date better. That was the 19th of August, and I observed pools of water in two work areas on the west wall and on the south wall [515] near the washmobile.

Q. Did you examine the exact pitch of the floor, or the exact grade?

A. No, I did not determine the exact grade of the floor, in fact, the thing that I determined was about the low spots and water lying in the depressions.

Q. Mr. Rivers, is it not common for concrete floors of this type to remain damp even though there is good drainage when water conditions are wet?

A. Not after the sub-grade material, the foundation material, has drained. They don't remain damp unless moisture is brought in on the surface of them.

(Testimony of Victor C. Rivers.)

Q. The point of my question is this, Mr. Rivers. Is it possible to construct a concrete floor that, when water conditions are wet, let's say, will at all times be dry?

A. The floor itself won't always be dry, but a floor, properly constructed, will drain. If the floor does not have a grade, the water collects and then you have a problem.

Q. At the time that you observed these pools that you have testified to, did you inspect the floor to see whether it was clean of dirt and grease and that sort of accumulation?

A. Yes, I did. I checked the general condition of the material and the dirt on the floor at that time.

Q. Was it clean so that the water could drain?

A. Yes, there was some debris on it—driving cars back and forth, [516] in and out—there was some little dirt and debris, but nothing to obstruct the water had there been drainage.

Q. How large was the collection around the washrack, Mr. Rivers?

A. Pretty good size—about as big as this table in front of you.

Q. Would it be possible just to remove that particular section and build it up so it would drain properly?

A. No, from observation, the floor was never laid to proper grade. You have to have it far enough back here so it will drain to the level you want.

Q. If you knew, Mr. Rivers, that the original

(Testimony of Victor C. Rivers.)

boards had been set by instrument, would your testimony be the same?

A. Yes, I wouldn't care how they were set if they were not properly troweled during pouring—you could still have the same result. The net result is what determines how good the work was.

Q. Where was the other main collection of water?

A. Over by the car lift.

Q. You mean the hoist?

A. The hoist, yes.

Q. How large was that pool?

A. Well, there was a number of pools in there. I didn't count the individual pools. I merely observed the condition of the surface. [517]

Q. Just a visual observation, without an instrument, is that correct?

A. That is correct, yes.

Q. Did you testify, Mr. Rivers, that the standard of construction, so far as grade was concerned, was from one-eighth to one-quarter of an inch?

A. That is the grade I prefer to use on a garage floor, and as I recall the specifications, it was 3/16ths inches to the foot.

Q. In laying out a floor like that, Mr. Rivers, do you take into consideration the location of the various types of equipment that are used?

A. Yes.

Q. In other words then, would you design a floor that is used just strictly for mechanical repair work at the same level pitch that you would one

(Testimony of Victor C. Rivers.)

that was designed to drain off water from a wash-mobile?

A. Well, as I say, in a garage floor, I prefer to use—the way you do that, you establish the grade of your drains and from that you grade your floor in. And where you have an area where you want some special piece of equipment to go in, you hold it more level—about an eighth of an inch to a foot. You can use that for a car lift or car hoist.

Q. The point of my question was this, Mr. Rivers. When you lay out a floor, you don't design it so that from one end [518] to the other it slopes a uniform three-eighths of an inch, per foot, do you?

A. No.

Q. You break the floor up into sections, according to equipment? A. Right.

Q. Then would change of location of equipment, after the floor is poured, have any effect on the functioning of the floor now?

A. It shouldn't have. The floor would be graded toward your drains. Equipment should not affect the grade of the floor.

Q. I realize that, Mr. Rivers, that it shouldn't affect the grade of the floor, but assuming that the floor was graded for one use, and the equipment was changed and it was devoted to another use, might that not have some effect on the way the floor would drain off?

A. No, I don't believe so.

Q. Yesterday I believe you testified regarding

(Testimony of Victor C. Rivers.)

the windows in the south wall. Did you or did you not say they were loose?

A. I said there was two of them that were actually loose, yes, that is correct—one in the south wall and one in the east wall.

Q. Were you referring to the window itself, or—— [519]

A. The window includes the frame and the window, the whole opening, the frame, casing, the jamb, sash and the panes, and the window itself.

Q. I am referring to the middle window that sets in the concrete block wall?

Court: Are they usually sold as a unit—altogether—the glass and frame and everything?

Mr. Rivers: The sash is sold as a unit, and generally the glass comes separate. The sash is the part that holds the glass.

Q. Is the work that would be required with respect to these windows, Mr. Rivers, just finish work? A. In my opinion, yes.

Q. Such as you described yesterday?

A. Yes.

Mr. Arnell: No further questions.

Court: Any redirect?

Redirect Examination

Q. (By Mr. Bell): Mr. Rivers, I will ask you to take this plat that Mr. Arnell has called your attention to—it is Plaintiff's Exhibit No. 3—and please tell the jury what it should cost normally the owner of the building to put this wall in, across

(Testimony of Victor C. Rivers.)

there to here, being three feet deep—and this wall here, the 12 feet at each end, across the 50 foot [520] space, according to this specification?

Mr. Arnell: I wish to interpose an objection, because there was admitted in evidence a contract calling for the price of \$2,542.00. I think this testimony can't be used to alter the contract.

Mr. Bell: You reopened it, and put a lot of stuff in that was provided in that contract. Let him tell us whether it is right or not.

Court: The objection is sustained. There is a contract for \$2,542.00 to do that precise work. It's too late now to argue about it.

Mr. Bell: Exception. May I come to the bench, your Honor?

Court: Yes. The jurors will not listen if any counsel do raise their voice.

(Counsel and Reporter approached the bench.)

Mr. Bell: I call your attention that the specifications before you show that the stairway and this other stuff was included in the general contract, and now he has had them all figured to make a figure around close to \$2,000.00. Now, then, what was included in the original contract then? I am going to show you that this was included and figured in the original contract because it would only cost a few hundred dollars to do any other work except what Mr. Arnell has shown here, to put the two little walls across and the two little end walls [521] twelve feet long. He got \$2,500.00 for about \$400.00 worth of work. There is something wrong.

(Testimony of Victor C. Rivers.)

Mr. Arnell: I propose that that is incompetent for the reason that the contract is in evidence. This man is not qualified to testify as to what the terms of that contract were intended to include. The contract before the Court, also the specifications, state that the footings and the foundation in the boiler room were in at the time this contract was signed on September 19th, 1950.

Court: What about the stairway and stairwell?

Mr. Arnell: Our contention is that that was an extra. I have shown Mr. Rivers the exhibit upon which that contention was based—Plaintiff's Exhibit No. 3, I believe it is—and he has testified that any work not shown on that plan would be an extra.

Court: Let me see the original contract. It is Exhibit 1, I believe.

Mr. Arnell: May I make another statement?

Court: Go ahead.

Mr. Arnell: As I recall Mr. Carr's testimony and by the evidence they have offered, at least a portion of the boiler room was an extra.

Mr. Bell: Just the two walls.

Court: He said, I think, that was \$250.00, or something like that. [522]

Mr. Bell: That's right, your Honor. That's exactly what the testimony was.

Court: Well, the specifications show, on page SC-1: "Footings and foundation as well as boiler room walls are in place." Is it your contention, Mr.

(Testimony of Victor C. Rivers.)

Arnell, that the stairway is an extra? If so, what is the basis?

Mr. Arnell: It is based, your Honor, on the fact that at the time the contract you have in your hand was signed, there was no plan or design for a basement, boiler room, and stairway.

Court: The stairway would be necessary in any event. Wouldn't a stairway be necessary in any event?

Mr. Arnell: Well, at the time the first contract was signed, Plaintiff's Exhibit 3, which is a layout of the foundation, was the only plan in existence, and to supplement what Mr. Bell said, that contract requires the demolition of the old walls that were in existence.

Mr. Bell: Only one wall to be demolished.

Court: I think the ruling will have to stand.

Mr. Bell: I would like to make another offer then. The defendant offers to prove by this witness, if admitted now at this time, that the only other work done under the first contract, other than that which the witness on the stand has testified to on cross examination by the plaintiff, is the wall in the front three feet deep and 50 feet, approximately, across [523] the front part of which is on an angle, and at the back two 12-foot walls, one on either side, which would only be three feet deep outside of the work that the plaintiff has just shown the cost of by the engineer; and if I cannot show the cost of these walls, it will leave the wrong impression before the jury, as to what the \$2,500.00 and

(Testimony of Victor C. Rivers.)

some odd dollars—let me see—\$2,542.00 that was contracted for in the original contract was for, because the cost of these walls, if the engineer is permitted to testify to that, has not been covered by cross examination by Mr. Arnell. It would not exceed Five or Six Hundred Dollars at the greatest amount.

Court: The trouble is that the parties agreed by written contract to do certain construction for \$2,542.00. That's Plaintiff's Exhibit 1—and after that work had been completed, the other contract was entered into, and in that contract there is a provision that footings and foundation walls and boiler room walls are in place.

Mr. Bell: Exception.

(Counsel and Reporter then left the bench.)

Q. (By Mr. Bell): Mr. Rivers, I call your attention to Plaintiff's Plat, BCG 5, and I will ask you to examine that?

A. Yes, sir.

Q. Mr. Rivers, is that a part of the plans and specifications that you examined in arriving at your figures here? [524] A. Yes.

Q. And is that a part of the second contract, the general contract, as you understand it to be?

A. I can't answer that question exactly. I am not entirely familiar with the contract agreement.

Mr. Bell: I think we can agree that all of these specifications, commencing at No. 2, up through No. 10, that were introduced by the plaintiff, are the plans and specifications upon which the second

(Testimony of Victor C. Rivers.)

contract was made, that is, the general building contract, can we not, Ed?

Mr. Arnell: I can't so stipulate, your Honor, for the reasons we have already stated to the Court. I realize they are the general plans of the entire building, but I can't stipulate that this work that is required by this particular exhibit would be included within the terms of the second contract.

Court: I am going to instruct the jury that the plans and the specifications are a part of the contract, and if this is part of the plans and specifications, they are to be instructed it is part of the contract. If there is something in there that should not have been in there, that was the business of the parties at the time to see that the plans and specifications contained only what belonged.

Q. Now, Mr. Rivers, upon the Court's statement, would you examine No. 5 there, and state whether or not that is the [525] plan for the particular stairway and stairwell—the stair-railing and so on, that were to be built in that boiler room?

Mr. Arnell: Object to the question upon the ground that it is incompetent. This exhibit is only a portion of the contract between the parties, and if Mr. Bell persists in questioning the witness about this plan, I think he should also bring the witness' attention to the provisions of the specifications.

Court: Not necessarily. Counsel will have a right to examine the witness. Overruled.

A. This sheet, No. BCG 5, of the plans is in essential conformity with the building as built.

(Testimony of Victor C. Rivers.)

Q. And now in that BCG 5, do you see the particular drawing of the stairway that was to be built there? A. Yes, I do.

Q. Would you tell the jury what else is in that drawing all the way through?

A. Well, the drawing shows the plan of the stairway and the boiler room—by the plans I mean the projected floor plan—and shows the arrangement of the steel, and shows the size and dimensions, shows the size and dimensions of the stairs, and of the foundations and of the floor slab—

Q. Does it show the floor slab right in the plans there? A. Yes, it does. [526]

Q. Now, Mr. Rivers, as an engineer, if the second contract provided to build the building and everything covered by the plans and specifications, would that include the stairway and the stairwell into the boiler room?

Mr. Arnell: If your Honor please, I wish to interpose an objection on the grounds that the question is incompetent. Although Mr. Rivers is an expert, he can't answer upon the basis of an estimation, or guess, as to what this contract did or did not provide. Therefore I think the question is improper.

Court: He is testifying as an expert upon the plans and specifications. I think the question may be answered. The objection is overruled.

A. Inasmuch as this drawing is a part of the contract documents, and the details and the general information as shown here, I would interpret the

(Testimony of Victor C. Rivers.)

plans to mean that the contractor was obligated to perform this work.

Q. As a part of the contract, Mr. Rivers?

A. As a part of the contract.

Q. Then if he were obligated to perform it as a part of the contract, it would not be a proper extra, would it?

A. Definitely no, unless there was some supplemental or outside agreement to that effect.

Q. Now, I would like to have that plan brought down before the jury so they can see it as this other one has been. May I, your Honor? [527]

Court: Yes.

Q. Now, Mr. Rivers, will you please take the pointer and show the jury the part of the drawing that is of the stairs leading down into the boiler room?

A. This is the southwest corner of the building. This is the stair leading down. This is the bottom of the stairwell and this is the entrance to the boiler room. This is a section cut down there through the middle of the stairs, showing the shape of the stairs and the steel that would go in it, and what type of a footing there is underneath it.

Q. Now, would you please show the jury the drawing showing the slab that has been mentioned as an extra?

A. This is a floor slab of the boiler room—this is the supporting slab which is an extension or part of the first floor.

Q. And are both floors—the extension of the

(Testimony of Victor C. Rivers.)

first floor and the floor of the boiler room—are they both shown in the plans?

A. Yes, the slab of the main floor over the boiler room is shown here, and the slab of the floor on the other is shown here.

Q. Are they a part of the original contract then?

A. They are part of this document, which is included as part of the documents of the original contract. [528]

Miss Wise: Your Honor, Mr. Rivers said the original contract. What did he mean by original?

Mr. Rivers: It is the general contract with which we are dealing. I think you used the term original contract, and I quote you on that.

Miss Wise: Didn't you say part of the original contract?

Mr. Rivers: I did. It has been referred to in various ways since I have been in Court—the general contract, the large contract, the original contract.

Court: There are two contracts in evidence now. An oral contract is just as much of a contract, if proved, as a written one, only if a thing is in writing it is not easy for people to forget it. The first contract for the rebuilding and moving of walls is dated May 24th, 1950—5-25-20, and that is Plaintiff's Exhibit 1, that was read to the jury, I think, when it was admitted. Then the contract that is being referred to now, as I understand it, is the contract for construction of the building, with certain limitations, of course, for \$38,450.00; that is,

(Testimony of Victor C. Rivers.)

putting up the building and doing certain work, and this written contract is dated the 19th of September, 1950. Now, the first one, for the moving of the walls and rebuilding the walls subsequently, that is dated, as I said, on May 24, 1950, and the second one, for the construction of the building generally, is dated the 19th of September, 1950. The second one bears the signature of both [529] the plaintiff and the defendant. The first one, the copy we have, is signed by Gothberg Construction Company, by Mr. Gothberg, and the copy we have does not bear the signature of the defendant, but the testimony, as I remember, was that the defendant either signed it or agreed to do so. There is no dispute between the parties that these two contracts were signed and agreed to by each of them. The witness now is talking, as I understand it—the questions have been directed to the second contract, dated——

Mr. Bell: September 19th.

Court: September 19th, and part of it says the contractor shall furnish all of the materials and all of the work shown on the drawings and described in the specifications entitled "Construction of Nash Garage." Those drawings are the drawings on the blackboard there, or part of them at any rate, and the specifications—Mr. Arnell will hold the book up so you can see it. The specifications have not all been read to you because they are voluminous, and no person in the world could remember it all. Certain paragraphs have been read, and you will take them with you when you decide the

(Testimony of Victor C. Rivers.)

case. And counsel, in their arguments, will refer to certain paragraphs, and the Court, in its instructions, will refer to certain parts of the specifications, and you will be instructed by the Court that this contract of September 19th and the plans and specifications all go together. They are all parts of the [530] contract. This Plaintiff's Exhibit 2, as signed by the parties, refers to and adopts the drawings as they are called—they are usually called plans, aren't they, Mr. Rivers?

Mr. Rivers: Plans include the specifications.

Court: They are all part of this contract, and you will be so instructed by the Court. Now, of course, having made a written contract, the parties can modify it by oral agreement, but that is a matter to be debated by and by. Counsel will proceed.

Q. Mr. Rivers, for the purpose of clarifying my statement, that the juror has asked about the contract, I refer to the contract as the original contract. Are you referring to that in answer to my question as the contract of September 19th—the general contract on the job?

A. Yes, the second contract that the Judge just mentioned.

Q. And I will ask the question over to clarify it for the particular juror. Does those plans that you have described there—are they a part of the second contract, or the one of September 19th?

A. They are definitely included in and are a part of the contract of September 19th.

(Testimony of Victor C. Rivers.)

Q. And from an engineering standpoint, if they are included in the plans and specifications then, it would necessarily not be an extra for which the contractor could charge, is that right? [531]

A. It would be an obligation under the contract without being an extra.

Mr. Bell: I see.

Court: Suppose the specifications contain some contradictory clause. Then what would your answer be, or could you make an answer to that?

Mr. Rivers: That would be a matter of arbitration. Ordinarily there is an arbitration clause. I believe you will find one in the specifications. The parties have to get together for consultation. The engineer would determine what was originally intended, and if there were any questions about his decision, it would be a matter of arbitration between the parties. The engineer would make a decision as to intent. There are occasionally conflicts between the contract and specifications, and the engineer interprets them, and if his decision is not accepted, there is arbitration. I believe you will find an arbitration clause at the end of these specifications.

Q. Mr. Rivers, did you notice one of the walls of the boiler room, which would be the south wall of the foundation, as to whether or not it is cracked and has a large curve in it?

A. The south wall of the boiler room, or of the stairwell?

Q. The stairwell. Did you notice a large bulge in that wall?

(Testimony of Victor C. Rivers.)

A. I don't specifically recall that. [532]

Q. Did you examine this water pipe on the outside at the front of the building? A. Yes.

Q. Would you please tell the jury what condition that is in?

A. The water pipe comes out of the wall of the building about three feet above the ground, and enters into the ground about six inches from the building. It is an exposed pipe and would be subject to freezing in the winter. It is not properly installed to be a safe pipe installation.

Q. Did you examine those pipes inside, that are supposed to come down from the top to connect to the exhaust of automobiles when the motors were running. Did you examine those?

Mr. Arnell: If your Honor please, I believe that this is beyond the scope of Mr. Bell's first examination. He went at some length through these items, and I don't recall he asked any questions about this, and I certainly didn't.

Mr. Bell: I didn't ask—I had forgotten.

Court: The fact that it was not put in on direct would not bar it now. I presume it is relevant.

A. Yes, I examined the exhaust pipes. The purpose of these exhaust pipes in the building is to put down through the exhaust of an engine while it is running, and it will then take the fumes up outside of the building, and you can run [533] your engines in the building without getting fumes inside.

Q. What did you find from examination of those pipes?

(Testimony of Victor C. Rivers.)

A. I found them to be—well, I should say, home-made. There was a piece of light solid metal pipe going out through the roof. Then there was a section of flexible pipe approximately 12 feet long, attached to that first pipe, and that sectional pipe was hanging from a counter balance weight on the wall, which kept it off the floor and overhead, so when they wanted to put it on the exhaust of an engine, they could pull it down and push it on the exhaust pipe.

Q. Were they adequate for the purpose or not?

A. I would not consider them adequate for the purpose.

Q. Mr. Rivers, when a garage is closed up tight in the winter months, and a group of mechanics are working in the garage, is there or is there not created carbon monoxide from running the motors in the place? A. That is right.

Q. Are these exhaust pipes, or pipes to carry this exhaust out, necessary in Alaska?

A. I consider them so, and I think if you are going to run engines indoors you must have them for the safety of the workers or the safety of anyone in the building.

Q. Mr. Rivers, you read all the specifications?

A. In detail. [534]

Q. I believe there is a clause in there that provides that if the specifications or ordinances or building codes conflict, that the building code shall prevail, is there not? A. Yes.

Q. Now, Mr. Rivers, what does the building

(Testimony of Victor C. Rivers.)

code require for a depth of a foundation for a building like this?

Mr. Arnell: If your Honor please, we should like to interpose an objection on the ground that the question is incompetent. The Building Codes of the City of Anchorage are the best evidence.

Court: Objection sustained.

Mr. Bell: Well, we will have to get one and bring it in. I just thought we could save time if he knew.

Court: There is a copy in my office, counsel.

Mr. Bell: Of the Building Code?

Court: Yes, it was given to me by the City Attorney about a year ago.

Mr. Bell: Is it about three quarters of an inch thick?

Court: Yes.

Mr. Bell: That is the General Code, I believe. We will have to get the building inspector to get the Building Code.

Court: Oh, I haven't that.

Mr. Bell: I haven't it either.

Q. Mr. Rivers, is there anything in the original specifications, that Mr. Arnell had you examine here, for the building [535] of anything other than one wall approximately 50 feet, or a little at an angle at the front, and then two walls, 12 feet long at the back extension of the main foundation walls, and one wall of 50 feet? Is there anything else in there that shows?

A. Yes, there is a chipping and removal of an

(Testimony of Victor C. Rivers.)

existing front wall. Evidently there is also chipping and removal of what was an existing wall across the rear and, in addition to the walls, there were the wall columns, fittings for the wall columns, and there is the wall foundations. They were all included in that plan.

Q. Does that plan show the depth of the wall?

A. Yes, sir.

Q. What depth does it show?

A. It says three foot of wall and one foot of footing, making an over-all depth of four feet, but it doesn't say what that depth is below. That is the depth from the top of the wall to the footing, but the plan doesn't show any existing ground level.

Q. So you couldn't tell from that how much would have to go into the ground to make the wall that high, because you do not have the ground level shown?

A. That is correct.

Q. I see. Now, Mr. Rivers, you were asked about this system of taking off two or three inches of the present floor, and [536] to rebuild it. Now, approximately how long, considering the normal work in Anchorage and the handicaps that you naturally run into, how long would it take, ordinarily for a contractor to go in there and tear that out and re-surface it so that it would be firm and true, sufficient to go back in and work?

A. It is pretty hard to answer that. It would depend upon how much equipment he had. Ordinarily, doing this job, a small contractor would have one compressor and probably two jack ham-

(Testimony of Victor C. Rivers.)

mers. Each jack hammer could chip probably 200 feet a day. That would be 400 feet for two men, and two jack hammers and a compressor operator. Now, we have got some 3,500 feet involved, about 8½ days of chipping to get the surface ready for repair, and there would be additional work of laying the concrete. It would probably take two weeks of time to do the work.

Q. Then, Mr. Rivers, how much time would be required to keep the mechanics and equipment off of that floor before it was hard enough to get back on it to work?

A. Well, to actually work—concrete gets the initial set or crystallization in a period of approximately four hours. Then it gets approximately one third of its total strength at the end of seven days, and it gets about 92% of its total strength at the end of 28 days, and a slab of this type could probably be used after about seven days. It [537] could be entered upon and walked on long before that, but to put it to any use would not be advisable. Seven days would be the minimum time.

Q. So the equipment would have to be taken out, and it would take three weeks before it could be used again?

A. Well, that would have to be worked out on a program. You would have to take out a section of the floor at a time and repair it, and then probably move to the next section. It could be worked out so part of the building could be kept in use and

(Testimony of Victor C. Rivers.)

the other part repaired. That would be a matter of sound operating program.

Q. But it would mean the same thing, or loss of space about the same length of time?

A. That is correct.

Q. Now, Mr. Arnell asked you about pouring a three-inch floor over this floor. If that was done it would be higher than the floor in the show room and the office, would it not?

A. That is correct.

Q. Would that ever be feasible from an engineering standpoint?

A. I think it is feasible, but I don't think it would be advisable.

Q. I see. Do you remember in the specifications the reference to the concrete slabs where they were not properly laid. What was to be done?

A. They were to be removed and replaced. [538]

Q. And if they were removed and replaced according to the contract, Mr. Rivers, what would it cost to do that?

A. Well, I believe, actually to remove and replace them, would take in the neighborhood of \$1.75 a square foot of floor space—perhaps as much \$2.00. Is that a seven or a six inch slab? As I recall, it is six inches.

Q. Six, Mr. Gothberg said.

A. I don't think it could be removed and replaced for at least \$1.75 to \$2.00 a square foot. It has reinforcing wire mesh in it, and it would be quite a job to remove that slab.

(Testimony of Victor C. Rivers.)

Q. \$1.75, and I believe you stated there was approximately 3,500 feet in the garage part?

A. In the part that would need reinforcement, yes, sir.

Q. At \$1.75 a foot. Now, Mr. Rivers, in your many years in Alaska, have you been in a large number of garages where there is concrete floors during the snow time? A. Yes.

Q. What happens when a car is run into a garage, where it is warm and it comes in from out on the street?

A. Well, the snow and the ice build up on it and it melts off, and you have quite a substantial amount of water in and around the car in the garage.

Q. Then is it very essential that the drains work properly so the mechanics can get in these cars?

A. I consider in the design of a garage that the drainage of the floor slab is very important. It either affects your work adversely or allows your people to work safely and satisfactorily.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Recross Examination

Q. (By Mr. Arnell): Did you, Mr. Rivers, in response to one of Mr. Bell's questions, testify that you would interpret the plans that have been initialed by Mr. Gothberg and were admitted in evidence here, to include the boiler room, unless there was some set agreement?

(Testimony of Victor C. Rivers.)

A. That is correct. They are items in the general conditions of the specifications, and this plan is included as one of those parts of the contract documents.

Q. Did you or did you not later testify that the work shown there, with respect to the boiler room, definitely was a part of the contract?

A. In the sense that this plan is included as a part of the contract documents, yes, except if there was some supplemental or other agreement.

Q. Then by that answer you did not mean that the work necessarily was actually part of the \$38,000.00 contract price?

A. I do mean just that—that the Plan No. BCG 5 is a part of [540] the contract documents, and the work shown thereon is included in the contract of September 19th, unless there is some supplemental agreement.

Q. Mr. Rivers, I hand you Plaintiff's Exhibit 6 and have turned to page SC-1, which lists the special conditions. I will ask you to read the first item under this schedule.

A. "SC-1. Conditions Existent At the Time Contract Takes Effect: A—Footings and foundations as well as boiler room walls are in place."

Q. What does that mean to you?

A. That means that the amount of work that is covered in this drawing is now withdrawn from the work by reason of this stipulation. It would mean to me that this work had already been accomplished, and that this specification, by being

(Testimony of Victor C. Rivers.)

agreed to in the contract, withdrew that work from the work to be performed.

Q. Then the cost of that work, whatever it might have been, was not included within the price of \$38,450.00? A. Under this condition, no.

Q. Mr. Rivers, Mr. Bell asked you regarding some exhaust pipes. I will ask you to turn to Page V-3 and look at Section V-07.

A. Yes, I am familiar with it.

Q. Do you know whether or not, at the time the building was turned over to Mr. Carr, the exhaust system that had been installed complied with this section of the specifications? [541]

A. On direct examination I was not asked that question. I will say that as far as I could tell the exhaust pipes, as specified or as installed, do comply with this specification. I was asked whether they were adequate and I have answered that question. No, they are not adequate.

Q. But they do comply with this particular specification?

A. Essentially, they comply with this specification.

Q. Now, Mr. Rivers, in regard to this concrete floor again——

Court: We will recess until 2:00 o'clock, and ladies and gentlemen, you will remember the admonitions of the Court as to duty. The court will stand recessed until 2:00 o'clock.

Whereupon at 11:55 o'clock, a.m., the trial of the above entitled cause was continued until 2:00 o'clock, p.m.

(Testimony of Victor C. Rivers.)

Be It Further Remembered, That at 2:00 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mr. Rivers may resume the stand, and counsel may proceed with examination.

Mr. Arnell: If Your Honor please, I would like to make Mr. Rivers our witness for one question.

Court: You may do so. He has been your witness as to [542] other questions. It is so mixed up that it's pretty hard to separate.

Direct Examination

Q. (By Mr. Arnell): Mr. Rivers, I will hand you Plaintiff's Exhibit 6 and ask you to read Section SC-1, C, under Special Conditions.

A. "Special Conditions. SC-1, C: Structural steel is on site, but is not in place and consists of blank pounds."

Q. By that provision, Mr. Rivers, would it be incumbent upon the owner, or Mr. Carr, to furnish all the structural steel for the building?

A. Well, it doesn't say. It says structural steel is on site and I assume that they might have some special stipulation in regard to any other part of it. I wouldn't know.

(Testimony of Victor C. Rivers.)

Q. Ordinarily, would this constitute an explanation that the contractor would be required to furnish this steel?

A. Well, it doesn't say the number of pounds here. It says structural steel is on site, and it doesn't say all of the steel, and it doesn't show the number of pounds. It is an omission that should have been corrected. Evidently it was not, but I don't see how the owner could be bound for all the structural steel under this clause. It could mean zero pounds and it could mean ten, and it could mean ten tons or more.

Q. Mr. Rivers, if you were estimating a job with that type of [543] special condition before you, would you include in your cost any items for structural steel, or would you exclude them?

A. If I were estimating a job, I would want to know what steel was in the job, and would add anything that wasn't there, but it is a hard question to answer as to what was actually on the site. It should have been determined as to if it was adequate. This clause means nothing in view of the fact that they have filled in no weight of the steel there. It just says "structural steel is on site but is not in place and consists of blank pounds."

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): Now, Mr. Rivers, Mr. Arnell had you read scope of work clauses before noon, and I wish you would read that same clause again. I want to ask you about it.

(Testimony of Victor C. Rivers.)

A. Was that in regard to footings and foundation of boiler room?

Q. Yes, sir.

A. It is Special Conditions, SC-1, sub-section A: "Footings and foundations as well as boiler room walls are in place."

Q. Now, Mr. Rivers, does that say anything anywhere about the floors in the boiler room being in place, or does it say anything about the stairwell or the stairway being in [544] place?

A. No.

Q. Then, all of this matter that you explained to the jury and pointed out this morning, then, on this map would not be affected in any way, except the walls of the boiler room, would it?

A. That is the way I would have to interpret it if I were interpreting it—that the walls were said to be in place, but it doesn't include the floor slab, and it doesn't include the stairway or the stairwell.

Q. Or the stair railing wouldn't be included either, would it?

A. No, we have to take this literally, and it says "Footings and foundation as well as boiler room walls are in place."

Q. Then the testimony that these matters here, that you explained to the jury this morning, should not be extras because they are covered by the contract of September 19th—then your testimony, as I understand it, was as to everything except the walls?

(Testimony of Victor C. Rivers.)

A. Except the footings and foundation, as well as boiler room walls.

Q. Yes, sir. And all that you explained to them before noon was the stairways, the different angles of the stair, the slab floor and the slab floor above the boiler room—all of them, as I understand now, is actually in the contract of September 19th? [545]

A. They are not specifically excluded from the contract by this clause and, as far as I know, this is the only stipulation in regard to that. Unless there is some other stipulation, they are definitely included in the contract in my opinion.

Q. And as I understand, they would still not necessarily be an extra?

A. They are included in the contract in my opinion.

Q. Yes. Now, these figures you gave Mr. Arnell this morning, of the stairway and the floors and everything, would not be termed an extra at all—should not be termed an extra at all—nothing except the walls?

A. I included the walls in my figure of costs. That is the walls from the footings down—five feet of the walls. I included that in my cost estimate this morning.

Q. Mr. Rivers, what is necessary in a foundation wall in that vicinity? How deep does it have to go to make it safe?

A. Well, in buildings of this kind, we generally remove all the loam on top of the gravel and try to penetrate to the gravel. We try to get below the

(Testimony of Victor C. Rivers.)

level of frost, and frost penetrates deeper than three or four feet, while most of the heat occurs in the top three or four feet, so a building of this kind, if the top material, which is loam and mucky material is removed and you go down three or four feet to gravel, you are generally down to an accepted depth [546] for a building of this kind.

Q. If the side walls for this building were put down to six feet and the footing below that, and then if they cut it off and made the footings and wall only down three feet of wall and one foot of footing, would that have a tendency to cause cracks in the building at the corners, where one side of the foundation was down seven feet and the other part would be four feet, including the footings?

A. No, sir. The bearing value of the steel we use on that type is 5,000 pounds value to the square foot, and that is a working load and the amount of weight on this wall is well under that.

Q. Mr. Rivers, if the specifications do call for it, and I believe they do—you have it, I believe—I wish you would read paragraph D of Section IV, under masonry, and explain that to me.

A. Under masonry: "Concrete Block—Section D—Placing steel: One 5/16ths inch round bar shall be placed in each space of the wall between every third course. 3/8ths inch column ties shall be placed between the same courses as shown on the drawings. The 5/16ths inch bars shall have at least one-half inch, but not more than three-quarters inch cover on the wall face side. All laps shall be forty-bar

(Testimony of Victor C. Rivers.)

diameters minimum. Bars shall be fully imbedded.”

Q. Would you explain that to the jury—what effect that has in [547] building a wall—an effect on the wall after it is built?

A. Well, what he is calling for here is a temperature reinforcement in every third horizontal course of the block mortar. He has called for 5/16ths inch round bar. Ordinarily, the purpose of the rod is to reinforce the steel and it is not a primary type of reinforcement. It is a secondary or temperature reinforcement, and due to contraction or expansion caused by temperature, it should hold the wall together and keep it together.

Q. Mr. Rivers, if this wall had had that rod in it, and I believe it is conceded it has not been in, it—

Mr. Arnell: We made no concession.

Q. Anyway, Mr. Rivers, if the evidence shows conclusively there was no such rod put in the wall when it was laid up, would that have any effect on the cracks in the wall?

A. I believe, under normal block construction, it would have a very important effect in helping to keep down the cracks. As I stated yesterday, we are not familiar with the contraction and expansion of these pumice blocks. There is not enough information available, but this building is only 100 feet long, and if those webbing or rods were all in there every third course, it should have a very beneficial effect in keeping cracks down and probably should keep any cracks from occurring, but I can't say

(Testimony of Victor C. Rivers.)

that on pumice block as accurately as I could on concrete or cinder [548] blocks.

Q. Now, Mr. Rivers, I hand you again this report that you have caused to be made, sealed and signed, and will ask you to state if that report is approximately the true and correct findings of your examination of this building?

A. Yes, it is, and I have so certified and signed it in the front title page, or the certification.

Q. And you have testified to the greater portion of all of the detailed facts that are in that report, have you not?

A. Yes, sir, that is correct.

Mr. Bell: We now offer the report in evidence, just for the general reasons and especially the reason that it will be convenient for the jury in verifying any dates as to what Mr. Rivers might have said.

Mr. Arnell: If your Honor please, we wish to interpose an objection. Mr. Bell stated that Mr. Rivers had already testified to what is in there. I think it is merely cumulative and it is immaterial because of that. I think further that it is incompetent also.

Court: The objection is sustained.

Mr. Bell: Exception. That is all, your Honor.

Recross Examination

Q. (By Mr. Arnell): Mr. Rivers, did I understand you, in response to Mr. Bell's question regarding the basement in the plans which are [549]

(Testimony of Victor C. Rivers.)

named, did I understand you to say that all this basement work would be included in the \$38,000.00 contract?

A. The only thing that is specifically excluded would be the walls and footings, as stated in this exception or in this stipulation.

Q. Mr. Rivers, I will ask you, do you know what the condition or stage of construction the boiler room was in at the time the contract was signed on September 19th, 1950?

A. No, I had no knowledge of that.

Q. If it were to develop that all of that work had been done at the time that the contract was signed, would you regard any portion of the boiler room as being within the terms of the contract?

A. You say if all of that work had been done prior to the signing of the contract?

Q. Yes.

Mr. Bell: Object to that question because it is diametrically opposed to the evidence. It's a hypothetical question. It does not embrace the evidence produced, and it contains contrary statements that are not in evidence.

Court: Overruled.

Mr. Bell: Exception.

Q. Let me phrase it another way, Mr. Rivers. Is your answer to Mr. Bell based on the premise that none of that work was done at the time the contract was signed? [550]

Mr. Bell: Object. Now it becomes more complicated and confusing because of the previous question.

(Testimony of Victor C. Rivers.)

Court: Overruled.

A. It was my assumption that, on entering the contract, none of the work had been previously performed except that part that was stated here. If it was already performed, there would be no reason for having it in the contract.

Mr. Arnell: That is all.

Mr. Kurtz: Mr. Rivers, I understood you to testify that the area of the floor, the entire floor, would be about 5,000 square feet?

Mr. Rivers: Of the entire building, yes, sir.

Mr. Kurtz: And excluding the area of the show room, which I believe you stated represented about 1,500 square feet?

Mr. Rivers: Approximately, yes, sir.

Mr. Kurtz: That would leave 3,500 square feet, I believe, and you then stated it would cost about \$1.00 a square foot to have that repaired?

Mr. Rivers: To have it torn down about two inches and brought to proper grade, yes.

Mr. Kurtz: About \$1.00 a square foot?

Mr. Rivers: I believe that was my estimate.

Mr. Kurtz: I believe later on there was some further testimony on it and that is what I am not clear on. I believe you estimated \$1.75 or \$2.00 a square foot—I am not quite [551] clear——

Mr. Rivers: That would be for taking out the whole slab and replacing it. My first statement was for chipping off two or two and one-half inches, approximately \$1.00 a foot, but to replace the whole slab, which is what the general clause in the speci-

(Testimony of Victor C. Rivers.)

fications indicate the owner could have done, it would cost between \$1.75 and \$2.00 a square foot.

Mr. Kurtz: Taking out the entire slab—would that mean removing all the concrete?

Mr. Rivers: Yes, all six inches. It is a six-inch slab.

Mrs. Curtiss: They keep referring to these water puddles on the floor caused by the rains. Now, I would like to know how the rain gets in there. Does it come under the doors or—

Mr. Rivers: Well, no. That is caused by cars coming in wet and the rain off the cars, and also by being washed by water that is used in the building or brought in on a car. For instance, a car that has snow and ice on it will fall and put quite a few gallons of water on the floor. The floor has quite a few depressions and low spots and will not drain.

Mrs. Curtiss: I understood the snow part, but I couldn't understand the reference to rain.

Mr. Rivers: When a car comes in out of the rain it will drip off, especially when it has mud under the fenders.

Mr. Boward: Mr. Rivers, do you interpret the plans and the specifications to include the partition between the show [552] room and the shop, and the doors between the show room and the shop as part of the prime contract of September 19th?

Mr. Rivers: Yes, I do. Now, the plans that are in evidence show a wall section that appears to be a concrete block wall. There are some pencil lines on that, evidently made at a later date, which show

(Testimony of Victor C. Rivers.)

a longer wall, which I assume to be a block wall; but that fire wall partition between the show room and the garage and the doors in it—it is my understanding that the three-paneled door in it was part of this contracted of September 19th.

Mr. Boward: The windows in the show room, that according to your testimony are not a good fit, would that be because the openings for the windows are not plumb, or what would create that occurrence?

Mr. Rivers: I checked the size of the glass and the size of the glass was practically identical for all of the three main windows. The openings are not square and true. That results, of course, in the glass being a poor fit.

Miss Wise: About how many cars can get into this garage?

Mr. Rivers: You mean for storage purposes, or for working?

Miss Wise: Whatever they use it for.

Mr. Rivers: Ordinarily a car can fit in a space of 10 by 24 feet, and you can still walk around it. We have 3,500 square feet and you still have to have access—a way in and [553] out—probably for working purposes, not more than 12 or 14 cars at the most. For storage purposes it would be maybe two or three more.

Miss Wise: Does that include the room that these hoists take up? Aren't the two hoists taking up room on the floor?

Mr. Rivers: Yes, they do, but ordinarily they

(Testimony of Victor C. Rivers.)

have a car right there. They are using it to lift and they work right there—right over the hoist.

Mr. Arnell: Your Honor, may I ask one question?

Recross Examination

Q. (By Mr. Arnell): Mr. Boward asked you the extent of the finish work on the interior portion of the building, Mr. Rivers, and made reference to the door in the fire partition, or whatever you wish to call it. I will ask you to turn to page SW-1 on the specifications and read the last sentence of the first paragraph.

A. "This work shall include a concrete apron by the gas pumps but shall not include the wall board or finish carpentry on any interior partitions, with the exception of the shower room and one restroom."

Q. Would that include the double door, or would it not?

A. The double door, including the hardware, is specified further in the specifications. I do not believe this would exclude it. [554]

Q. Wouldn't the hanging of the doors be included within the finish carpentry?

A. Well, it is a question that's subject to debate. I believe that the hardware list and the finish carpentry statements covers it in such a way that this could not be misunderstood.

Q. In arriving at your conclusion, Mr. Rivers, did you talk to the original architect, the engineer who worked up these specifications and plans?

(Testimony of Victor C. Rivers.)

A. No, sir, I did not.

Q. Then, at this time, you do not know precisely what the intent was?

A. No, I definitely do not.

Mr. Arnell: That is all.

Court: That is all.

Mr. Bell: That is all.

Court: Another witness may be called.

Mr. Bell: We have a witness on his way. He is coming in a taxi and it shouldn't be a couple of minutes until he will be here.

Court: We may as well stand at recess until the witness comes.

Whereupon, the court at 2:32 o'clock, p.m., recessed until 2:40 o'clock, p.m., at which time the following proceedings were had: [555]

Court: Without objection, the record will show all members of the jury present. The next witness may be called.

Whereupon,

ROY FARRAR

was called as a witness on behalf of the defendant, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please?

A. Roy Farrar.

Q. What is your occupation, Mr. Farrar?

A. I am a mechanic.

Q. How long have you been an automobile mechanic?

(Testimony of Roy Farrar.)

A. Oh, approximately four to five years—four and one-half, I would say.

Q. Did you formerly work for Mr. Carr at the time he was operating the Nash Garage?

A. Yes, I did.

Q. And are you still working at the same place for the new operators?

A. Yes, I am.

Q. Mr. Farrar, how many men usually worked for Mr. Carr, and approximately how many for the present owner, as an average, in the shop?

A. Oh, I would say between five and seven, on an average.

Q. And were they all working on day shift, or did some work [556] a day shift and some the night shift?

A. No, they all worked the same shift.

Q. Are you familiar with the conditions of the floor in that garage during the time that you worked there for Mr. Carr, and during the time that you have worked for your last employers?

A. Yes, I think so.

Q. Would you just tell the jury, in your own words, what condition the floor is in?

A. Well, it is rough and it is uneven. It is cracks in there. You can't get the creeper wheels over. Water will stand a half to an inch deep in spots, and whenever the water stands there, you have to sweep it down the drain with a broom. It won't run down itself.

Q. About how times a day would you have to

(Testimony of Roy Farrar.)

sweep this water down the drain, if it was snowy weather?

A. One to two to three times for every car you put in.

Q. Approximately how many cars would be put in there during the normal day?

A. That's hard to tell. I would say, on an average, anywhere from 10 to 20.

Q. And you would have to sweep the water into the drains two to three times for each car?

A. Well, it would depend how much time they have been in there. The longer they were there the more water. [557]

Q. In the winter time, when cars come in, are they coated pretty well with snow and ice?

A. Yes, especially pickups. They can't even turn their wheels.

Q. When they come in in this warm room, how long does it take to melt the ice?

A. If you don't use steam, three to four hours.

Q. Do you have an instrument known as a steamer? A. Yes.

Q. And you use that on cars you are going to work on? A. Most of the time, yes.

Q. Mr. Farrar, tell the jury what you do to get under the car to work?

A. We have a four-wheel creeper, we call it, and it sets up about an inch and a half above the floor, and we have to lay on that and scoot around underneath, and it has four wheels on casters and they turn in the direction you want them to.

(Testimony of Roy Farrar.)

Q. I believe you stated a few moments ago that there were places in there you couldn't get the creepers' wheels over it. Would you explain what prevents the creeper wheels from going over those places?

A. There is some places an inch and a half—the counter is sunk and you can't get the wheels over there. You have to get up and raise it over. [558]

Q. When the water is in under the cars and you get the creeper in that condition, what do you have to do?

A. You have to pull it up the best you can or slide it over and lift the thing over every one. It sticks right there.

Q. Now, did you or any of the other men have any trouble last winter by getting wet there?

A. Yes, all of us had colds. I don't know whether it was due to that or not, but we worked there and got wet, and then we would go outside where it was cold, and I suppose it did have something to do with it. It was cold outside and then you were damp from the inside.

Q. Can you remember any incident in which your clothing became wet and later, working outside, your clothes were frozen?

A. Oh, yes, about every day. You were wet on your coverall legs where they dragged through the water.

Q. As I understand, in moving this creeper around, you would get your clothes wet where it hung down below the creeper, is that right?

(Testimony of Roy Farrar.)

A. Yes, because you just use your heels. You move your feet and your coverall legs would drag in the water.

Q. And any portion of you that hung out over the creeper—would that get wet?

A. Yes, your arms and legs mostly.

Q. Have you worked in other garages than this one? [559]

A. Yes, quite a few.

Q. Did you ever work in one that was similar to this in any way?

A. No, most of them had good drainage to the back of the car all the time where we didn't have to do that.

Mr. Bell: You may take the witness.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Do you mean to inform the jury, Mr. Farrar, that there is anywhere from no water to half or three-quarters inches all over the floor—the entire floor?

A. Yes, that would be right, yes.

Q. You mean there are no spots at all that slope?

A. Well, there is none that slopes towards the drain, no. I would say the drains seem to be the high spots in the floor.

Q. Is that your personal opinion?

A. No, I seen it because your drain is here, and it will sit to an inch deep, depending on the cars

(Testimony of Roy Farrar.)

coming in there. That is the worst one. The rest are half an inch to a quarter of an inch.

Q. Wouldn't you have to sweep the floor in the winter time when the ice and snow melted anyway, Mr. Farrar?

A. No, not water itself you don't. Ordinarily it will drain [560] enough so it isn't deep enough, but if it is standing there you have to sweep it off or else get wet, either one.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): One more question. Do you know whether or not mechanics quit work there during the time you had been working there, due to the condition of this floor?

Mr. Arnell: If your Honor please, I think that question is objectionable on the grounds that it calls for hearsay evidence.

Court: You may answer if you know, of your own knowledge.

A. I don't know for sure, no. I know that a few quit there during the winter time, but I don't know what for, but there has been more quit in the winter than now, but most of them don't say, when they do quit, what the reason is. I know the turnover is more in the winter than it is in the summer.

Mr. Bell: That is all.

Court: Another witness may be called. This witness, without objection, will be excused from further attendance.

Mr. Bell: No objection on our part.

Court: You may leave if you wish, Mr. Farrar, or you may remain if you wish.

Mr. Bell: We rest. [561]

Mr. Arnell: If your Honor please, just for the record, I would like to present a motion for a dismissal of the cross complaint for the reason that the evidence is not sufficient to establish the allegations of the cross complaint. Have you filed an amended complaint?

Mr. Bell: No.

Court: If argument is to be had, I will excuse the jury.

Mr. Arnell: I submit without argument at this time, your Honor.

Court: Very well, the motion is denied.

Mr. Arnell: Call Mr. Taylor.

Mr. Bell: Your Honor, while you are waiting at this time for Mr. Taylor to come up, I understood you permitted him to file an amended complaint without prejudicing my rights in the matter, and it would be denied without answer, is that right? It was never served on me until the second or third day of the trial and I would have a number of days, of course, to answer it, and if there is any technical advantage trying to be taken of it, why then I will ask permission to answer it; otherwise I thought it would stand denied without answering.

Court: I am going to break the ordinary rule at this time on account of the circumstances, and send the pleadings to the jury, so it might be to the

advantage of the defendants to deny, if the defendant wishes to deny, the amended complaint.

Mr. Bell: I will do that. [562]

Mr. Arnell: I might state for the record that I didn't intend to base my motion on the fact that Mr. Bell had not filed it.

Mr. Bell: I will file that, your Honor.

Court: I was sure that counsel was not trying to take any advantage of the pleading, but since the pleadings are going to the jury, which is not the usual custom, it may be—if counsel wishes, he may file an answer to the amended complaint.

Mr. Bell: All right. I would like to do it, otherwise the original answer will go to the jury if the defendants answer.

Mr. Arnell: Call Mr. Taylor.

Court: Mr. Taylor may be sworn.

Whereupon

MAYNARD TAYLOR

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Taylor?

A. Maynard L. Taylor, Jr.

Q. What is your profession?

A. An architect.

Q. How long have you been so practicing?

A. In private practice, since 1946, in Anchorage.

Q. Do you have your own firm here?

(Testimony of Maynard Taylor.)

A. Yes, Taylor and Kilpatrick.

Q. Are you familiar with the garage known as the Nash Sales and Service Garage?

A. I made a physical inspection of the garage last week, without knowledge of the complaints involved in this trial, and without having advantage of an examination of either the specifications or the drawings. However, I did make a physical inspection of the building.

Q. Did you also examine and inspect the concrete floor? A. I did.

Q. That was just a physical inspection, was it not? A. Yes.

Q. In other words, you didn't use any instrument on it? A. Nothing.

Q. As to the texture of the concrete, Mr. Taylor, what did its appearance indicate to you?

A. Throughout the entire building, or in the repair area?

Q. In the repair area?

A. In the repair area the monolithic finish appeared reasonably normal. At the time I made the physical inspection, evidently one of the questions arose as to the drains. There were two areas at the time I made the inspection that had some standing water on those areas.

Q. Did you measure the depth of the standing water? [564] A. I did not measure it, no.

Q. Did you observe any condition which would indicate to you that the entire floor in that area had to be removed?

(Testimony of Maynard Taylor.)

A. No, I saw no physical evidence of any reason why the entire area should be removed. There were two areas, as I mentioned, that did have standing water.

Q. Would you point them out to the jury in the location of the building, please?

A. The most objectionable, or the greatest depth of water, probably was the area immediately in front of the rear door.

Q. Is that the location of the washmobile?

A. I am sorry, I am not sure.

Q. Was there a rail on the floor, or do you recall? Were there two rails on the floor?

A. For the lift?

Q. No, on which the washmobile mechanism travels? A. Yes.

Q. Where was the other place where you might say there was a vast accumulation of water?

A. It was on the west side of the building?

Q. In the rear of the hoist?

A. In the vicinity of the hoist, yes.

Q. Did you make any actual measurement of the depth of water in there in this place? [565]

A. I made no actual measurement. It appeared from observation, in walking through the area, that it was approximately one-half inch and the other probably less than a quarter of an inch—probably an eighth of an inch.

Q. Are there only two drains in the building, or do you know?

A. I couldn't say for sure. There were men

(Testimony of Maynard Taylor.)

working and I had no benefit of plans so that I could check specifically where the drains had been placed. It is possible there were drains that I didn't see or couldn't see.

Q. Do you recall how many individual slabs there are that go into making up the floor in that area?

A. It would be an estimate. I kept no figures because at the time I actually didn't know what was involved in this particular suit, so I made a general inspection of the entire building, probably about many things that are not involved.

Q. Were there any cracks in the individual slabs which you observed?

A. Not excessive cracks, however, there were expansion joints.

Q. Those are a different thing, though, from a crack in the slab itself? A. Yes.

Q. Mr. Taylor, I hand you the specifications concerning this particular building, and have turned to Section II, page 4, and ask you read the top line. [566]

A. Do you want this read aloud, or to myself?

Q. Perhaps, for the benefit of the jury, you had better read it aloud.

A. "Remove and replace, when directed by the engineer, topping which is loose or surfaces showing excessive shrinkage cracks. Remove and replace slabs which do not drain properly."

Q. Mr. Taylor, as an engineer who has had experience here, what would be your recommendation

(Testimony of Maynard Taylor.)

with respect to repairing the area around the wash-mobile, if such was necessary?

A. My recommendation would be that a topping be used, meaning a layer added to an area, rather than the removal of the area.

Q. Based on the observation that you made, Mr. Taylor, are you able to state to the jury approximately how many square feet of that area should be fixed up, if it is the contractor's obligation?

A. Mine would be entirely an estimate in that particular area that is in question. It appeared like it was an area approximately 100 square feet would take care of that particular area; however, if I were asked to specify a method by which the entire area could be taken care of, I would first wish to go in and personally place water over the entire area. The two areas that I saw at the time I was there might not be indicative of the necessary depth [567] you might have to go in those two areas. So my recommendation would be a topping, but I couldn't say now what depth.

Q. Do you mean you would have to chisel off part of the existing concrete or lay something over it?

A. There are products you could place over it, again depending on the depth. If the depth is insufficient for the particular product, then you would have to chisel—remove part of the existing concrete.

Q. Would you have to remove two or three inches of it, or just chisel the surface?

(Testimony of Maynard Taylor.)

A. It wouldn't involve two or three inches, no.

Q. Would a half inch be enough in order to produce adherence of the two concretes?

A. I would say three quarters of an inch for the various products. If it was straight concrete, you would probably want to go to a depth of at least an inch and a half.

Q. Will you name these products?

A. Magnacite is probably the general term.

Q. If you were an architect on the job, confronted with a situation like this, what would you recommend for restoring or improving the condition around the washmobile?

A. Our office, when confronted with these questions—usually it involves considerable earlier time of negotiation than this time is. Normally, we would direct the contractor, whose responsibility it was, to submit to us a proposal [568] for the correction; and various contractors, having different purchasing power, might come forth with a different proposition. However, at that time, we would probably have to investigate who, at the moment, was installing these various products, but it would probably be one of the magnacite type.

Q. Assuming magnacite were used to correct the condition you observed down there, can you give the jury an estimate, per square foot, of what it would cost to build up the floor in the two places you have referred to?

A. We have had prices in the office, depending on areas involved. There is a charge based on mov-

(Testimony of Maynard Taylor.)

ing into an area. We have had prices in the office varying from 50c a square foot to probably a little in excess of a dollar. The two areas, assuming my estimate is correct, of \$1.00 a square foot per each, which would be \$2.00 a square foot—it would involve a price of 50c to a dollar per square foot.

Q. In your opinion, Mr. Taylor, do you think that would be a reasonable way to correct the excessive accumulation of water, based upon the present knowledge you have?

A. I think so at this time, yes.

Mr. Arnell: No further questions.

Court: Counsel for defendant may examine.

Cross Examination [569]

Q. (By Mr. Bell): Mr. Taylor, what is the difference between a structural engineer or a registered engineer, and an architect?

A. Registered structural engineer?

Q. No, a registered engineer in Alaska here.

A. A registered engineer in Alaska may be a civil, mechanical, electrical, structural, and in all, comes under the same license. A registered architect is a man qualified for the design of space or building.

Q. And I believe you stated you were an architect? A. Yes.

Q. Do you know Mr. Rivers? A. Yes.

Q. Do you know whether or not he is a registered engineer?

A. Yes, he has License No. 1, I believe, or 2.

(Testimony of Maynard Taylor.)

Q. I see. Mr. Taylor, I believe you stated you went there some day last week, was it?

A. I believe it was on Thursday. Thursday, at about 11:00 o'clock, I believe was the time.

Q. 11:00 a.m.? A. Yes.

Q. Was it raining at that time?

A. It was not raining.

Q. Was it a nice, clear day?

A. It was at 11:00 o'clock, yes.

Q. And the only water holes you found were not over one-half [570] inch deep, are you sure of that, Mr. Taylor?

A. Without measuring, I am as sure as I can be, by visual inspection.

Q. How many of those holes, carrying water, did you see?

A. I saw two at the time.

Q. I believe you stated \$1.00 a square foot would fix one of them, and \$1.00 a square foot of concrete would fix the other?

A. Those are approximate figures, based on physical observation at that time, yes.

Q. How many drains did you see there?

A. I was primarily interested in the most objectionable spots, which was that area directly in front of the door, and that is the one that I was primarily concerned with as being the most objectionable.

Q. Who told you that was the most objectionable spot? A. The water on the floor.

(Testimony of Maynard Taylor.)

Q. Did anybody tell you that, other than just the water standing on the floor?

A. No, that was physical observation.

Q. Mr. Taylor, when there is snow on the ground, and when it is raining, cars coming into the garage usually bring considerable snow and water in, don't they?

A. That is correct.

Q. Of course, this being a clear, nice day when you were there, [571] you didn't have that to help you in making an examination? A. No.

Q. Do you know how thick that floor is?

A. No, I do not.

Q. Did you put any instrument on it at all to test the drainage or slope in that floor?

A. No, I did not.

Q. Do you know whether it has any slope in it or not? A. No, I don't.

Q. Mr. Taylor, if you were an architect on a job, and was in charge of handling the work, and the specifications provided that the floor should have a drain of 3/16ths of an inch to the foot and that it should properly drain, and the men would put in such a floor as they put in down there, leaving it in the condition that it is down there, now, would you accept that kind of a job? Would you accept and approve it? A. No.

Q. If it provides that if it is defective—that it would be torn out and put in again—would you allow them to patch it up with a little magnacite, or would you require them to put in a decent floor?

(Testimony of Maynard Taylor.)

A. There are circumstances. I mean, there is so many factors involved. To speak in generalities, the answer would be no, but there are many factors involved. You see, in our [572] contract documents, there is intent and interpretation. That is why I say, specifically, the answer as the question was put, is no. However, there are other factors.

Q. Well, then, if you would not approve it, what would you require him to do then to fix it? Now, if you were an architect in charge of the work and representing the man who was putting up the money to build the building, what would you then require the contractor to do before you would accept it?

A. He would correct it to my specification and the owner's specification. The reason I qualify that is for this reason: There are occasions when something is not correct; however, to the owner it is of small importance, and he often will take a payment in lieu of correction.

Q. Now, if you were an architect, and Mr. Carr was the owner and financing it, and he specifically refused to accept it in its condition and explained himself to you and to the contractor, why he would not accept it, then what would you do?

A. It would be corrected.

Q. And what would it take to correct it?

A. There is one question I have and it is relative to this. There are expansion joints in the slab and I do not know whether or not there are drains provided in each area that is supported by expan-

(Testimony of Maynard Taylor.)

sion joints. In other words, if it is [573] impossible to comply with the specifications, you can write them so it is impossible. And if it is impossible, then a certain amount of leeway has to be given. Now, all factors being equal, if the drainage is possible and it can be done, then I would require that it be done. If the specifications and the plans are such that it cannot be done, of course, certain leeway would have to be given. In this particular case, it depends on how the building was accepted. It is being occupied and judging upon the basis it is being occupied, I would probably recommend that a topping be put on to keep it in occupancy so the owner would be able to use it. If it was not occupied and had never been accepted, I would require considerable more work to be done.

Q. Would you require them to break it out, and a decent job put in—one you would approve?

A. I think I would personally approve monolithic concrete or cement topping.

Q. Now, how thick a topping would you put on that?

A. Normally we have specified, where we don't use a monolithic pour—where we use a topping—we have specified all the way from an inch to an inch and a half, depending on the occupancy. Assuming that the slab was below four inches, I would probably say one inch topping.

Q. And if it was a six inch slab, what would you say? [574]

A. If it is a six inch slab, and the topping were

(Testimony of Maynard Taylor.)

placed at the time the other concrete was, I would say one inch would be fine.

Q. You have seen the garage and you know that was not done? A. No.

Q. Now then, Mr. Taylor, in the condition it is in now, what kind of topping would you require?

A. A minimum of one inch, not to exceed an inch and a half.

Q. What do you generally set forth in your specifications for drainage, Mr. Taylor, in a garage?

A. On a floor of this kind, it would be considerably less than you have. Probably on this particular area I would not go over an eighth.

Q. Now, you naturally have a little difference in the slope of the drainage the nearer it gets to the catch basin or hole it goes out of. You increase your slope the nearer the catch basin?

A. We normally don't increase the slope at all, except at the area immediately at the basin. There is a certain very small area that you trowel to make sure—you set your basin probably a quarter of an inch low, and then a foot area around that you trowel off to get the drainage there, but we don't carry it back any distance.

Q. You don't carry any drainage back?

A. No additional slope. [575]

Q. Then how much do you carry, say a foot back?

A. An eighth of an inch from a foot on back.

Q. But what do you require from there on down to the drain?

(Testimony of Maynard Taylor.)

A. Actually, all we require is an eighth of an inch. The contractor, normally, to protect himself against human error, will set the drain slightly low so he is sure he has drainage.

Q. You think there were two drains there in the floor when you were there?

A. As I remember that is what I observed; however, there could be more.

Q. So, Mr. Taylor, would you mind coming down here just for the convenience of the jury to see this, and look at the plat referred to as BCG 10, and tell the jury how many drains there should be, if the floor was built according to the plans?

A. This drawing indicates one, two, three, four, five, six drains in the rear area.

Q. Mr. Taylor, isn't there seven? Here's a blueprint of the same thing that might be a little clearer.

A. Oh, excuse me—I take it back. There's one that isn't clear on there. There is seven—that's correct.

Q. Now, would you check that just a moment. Don't you think all of those drains are necessary if the floor is properly built and constructed? [576]

A. As I said—do you have a drawing showing the expansion joints?

Q. I don't believe we do.

A. Ordinarily, we would drain each area around an expansion joint.

Q. But do you think that seven catch basins or drains would be necessary for a building of that size?

(Testimony of Maynard Taylor.)

A. I probably, in the interest of economy, I probably would not design it with quite that many.

Q. You saw two there, when you were down inspecting it the other day? A. Yes.

Q. Mr. Taylor, you wouldn't allow any topping to be just scattered in the low spots and troweled out to an edge anywhere, would you?

A. No.

Q. What would happen if you did that?

A. It would crack and fall off.

Q. Crack and break? A. Yes.

Q. Would it also break more, say in a garage where they have heavy tools and jacks with which cars are jacked upon a rail and moved? Would that have a tendency to break it worse?

A. Worse than what? [577]

Q. Worse than it would in an ordinary floor somewhere?

A. Naturally it will break easier with heavy work, yes.

Q. Mr. Taylor, you have, I take it, designed and superintended the design and structure of buildings similar to this? A. Yes.

Q. Did you ever handle a garage floor?

A. Yes.

Q. Are you generally pretty strict about getting a garage floor in good shape?

A. Yes. However, I would say we were no more strict than we would be in a public store, for example, if you are going to use a finished concrete. The last garage we supervised and completed, at

(Testimony of Maynard Taylor.)

that time the area was such that we only used one drain and we sloped all one direction.

Q. You used a rather large drain and sloped everything one way? A. Yes.

Q. But, generally, on a large space of concrete floor, you do use more than one drain?

A. Oh, yes.

Q. Did that one properly drain? A. Yes.

Mr. Bell: That is all.

Redirect Examination

Q. (By Mr. Arnell): [578] Mr. Bell asked you about the area along the west wall and I believe you testified in response to one of my questions about that. Now, the area around the hoist, Mr. Taylor, would that have to be virtually flat—the concrete?

A. You mean whether or not that would have 3/16ths inch slope at that particular area?

Q. My question is: Would it be good construction practice to have that degree of slope underneath the hoist area?

A. We wouldn't, no.

Q. In other words, in order for the hoist to function properly, your grade would have to be much less than that, would it not?

A. There are different types of hoists, but this type you have out there—the setting and maintenance of the equipment would be easier with the floor area flat in that particular small area, yes.

Q. Do you believe, at this time, Mr. Taylor, that

(Testimony of Maynard Taylor.)

the floor could be repaired by the application of magnacite, as you have previously described to the jury?

A. I think it could be. As I said, I have only had physical observation of two areas. I might want to observe whether or not there were other areas that I have not had the benefit of observing. that need it; however, based on those two areas, I would say yes, it could be corrected.

Mr. Arnell: I believe that's all. [579]

Mr. Bell: Just one question.

Recross Examination

Q. (By Mr. Bell): Mr. Taylor, do you think it would make this hoist better by having the water hole around it, or would it be better if it was drained?

A. The obvious answer is it would be better if it was dry.

Mr. Bell: That is all.

Court: That is all. Another witness may be called.

Whereupon,

LORN E. ANDERSON

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Anderson, please?

(Testimony of Lorn E. Anderson.)

A. Lorn E. Anderson.

Q. Are you acquainted with Mr. Carr?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. The first part of 1950. I don't remember what the date would be—either the fall of 1949, or the first part of 1950.

Q. Would you state for whom you are working now, Mr. Anderson, please?

A. District Engineers. [580]

Q. Are you an engineer by profession?

A. Yes, sir.

Q. Were you graduated from a university?

A. Yes, sir. I was graduated from Oregon State College.

Q. In what field of engineering?

A. Structural engineer.

Q. Did you have occasion, in the year of 1950, to work for Mr. Carr?

A. Yes, sir. I did.

Q. Would you relate to the jury, briefly, what that work consisted of?

A. I was employed by Mr. Carr to design the garage, or I should say, complete the design of a garage that he was building on Fifth Avenue and Denali Street. It consisted actually of two parts—one part was for a change in the foundation that had already been built, and the second part was for completion of the structure.

Q. Did you revise the first plan that was drawn,

(Testimony of Lorn E. Anderson.)

for the purpose of moving the building back and tearing out a portion of the old foundation already constructed?

A. I didn't revise the plan. I drew the plan which is now in evidence.

Q. Is that the only plan that was in existence at the time the first contract was signed on May 25th, 1950?

A. It was the only plan in that contract. We had started work [581] on the remainder of the building, but it was not part of the original contract.

Q. What work was contemplated at the time the foundation layout was drawn by you?

A. The work contemplated was actually in two parts. The first part we were asked to do was to draw a plan indicating the work that had to be done to move the foundation back the ten feet required by the City. In order to move it back ten feet, we had to come off at a point where the steel set on the foundation, and we had to move it back actually twelve feet, three inches, if I remember correctly, but it consisted of taking out the front twelve feet, three inches, chipping that concrete out, putting a wall across in the same manner it was before, with part of it straight and part of it diagonal to the corner. Also, chipping out the back wall and putting in a new wall twelve feet, three inches back of that where the connecting wall to the east and west side is.

Q. I hand you Plaintiff's Exhibit 3, Mr. Ander-

(Testimony of Lorn E. Anderson.)

son, and ask you to state whether or not that is the plan to which your testimony refers?

A. It is.

Q. At the time of the signing of the first contract for the work that is required by that particular plan, was there any intent to include within the contract, so far as you [582] know, the area known as the boiler room?

A. This contract was let and was to be charged to the City, because this was the amount of work that was included that they would have to pay for in taking out the ten feet in order to widen that street, and this original contract was let to cover that part. The boiler room was not a part of the first contract at the time that it was let.

Q. Did you, subsequent to the time of the preparation of this plan, complete all of the plans under which this building was to be constructed?

A. Yes, sir.

Q. You have heard the testimony here. I will try to be as brief as possible. Are those plans the ones that have been introduced into evidence here?

A. Yes, sir.

Q. How long, Mr. Anderson, did you serve as architect, or inspector, of this job for Mr. Carr?

A. I was working as Mr. Carr's representative up until about January 20, 1951.

Q. I hand you here Plaintiff's Exhibit 7, and ask you if that letter bears your signature?

A. Yes, it does.

Q. That is the letter which approves or author-

(Testimony of Lorn E. Anderson.)

izes certain extra work to be done, is it not, Mr. Anderson? A. Yes, it is. [583]

Q. Will you describe briefly for the jury what that work included?

A. In the first item, Item A here, it is "Install an 8'x8' overhead, hand operated door in the south wall." That is the door in the rear of the building that was put in to let cars out of the washmobile and it is on the side towards the alley. It included leaving out part of the concrete blocks and putting in an overhead door which was 8'x8'. The second item is "Remove the northwest 3'0" by 6'8" door in the northeast wall and install a 4'6"7' plate glass window in its stead." That is an ordinary passenger door, or personnel door, in the northeast wall. That is a diagonal wall on the front of the building. In other words, they took out one of the doors in the front of the building and put in a plate glass window instead. The third item is "Install a 2'6" by 5'0" by 6' slab—reinforced slab—over the boiler room stair landing. The compressor shall be relocated to this position." The fourth item is "Move the fuel pumps to a position sixteen inches from the face of the northeast wall." That was to move the pumps out. I believe, I don't remember just exactly, but they were picked up from one place and moved a few feet in that instance. The fifth item is "Install a two-plunger hoist in lieu of the one-plunger hoist shown." On this item, Mr. Carr furnished us with descriptive literature [584] which we, in turn, furnished Mr. Gothberg for his infor-

(Testimony of Lorn E. Anderson.)

mation, and which a one-plunger hoist was indicated, and it was later determined that a two-plunger hoist was wanted, and, in turn, we had Mr. Gothberg put in the holes for a two-plunger hoist. The sixth item is to "increase the height of all plate glass windows to seven feet." That is along the front of the building on Fifth Avenue, and on the northeast wall by the gas pumps. Mr. Carr decided that he would like windows seven feet high instead of six feet high and, in turn, they were increased a foot. The seventh item is "The northeast wall is to be changed to a spander construction by pouring three columns in this wall." Originally it called for block construction with two doors in it, and after the contract was let, Mr. Carr decided he would like some windows in that wall so, in turn, instead of using blocks, we had to go to spandrel construction, which is actually three concrete posts over which you have a steel beam to hold up the concrete blocks that are above that, and the windows were put in that area. There is another change. We provided for a second window and there is a door in that area. In order to make the wall structurally sound, it was necessary to pour concrete columns and a spandrel beam to hold up the blocks above it and also to hold the marquee.

Q. Are you familiar with the stage of the building and boiler [585] room at the time the second contract was signed on September 19th, 1950?

A. Yes, sir, I was.

(Testimony of Lorn E. Anderson.)

Q. What was the stage of completion of the boiler room at that time?

A. The boiler room—the walls were built, the stairs were constructed, and everything but the roof slab was on it.

Q. Was the boiler room floor also poured at that time? A. Yes, sir.

Q. In other words, the boiler room was complete, with the exception of the top floor slab, at the time the contract was signed?

A. That is correct.

Q. Are you able to give the jury an estimate of the value of the extra cost of the boiler room, Mr. Anderson?

A. That is the extra cost of the boiler room over this change in the wall that's called for in the first contract?

Q. Yes, the difference in the cost that would arise by reason of the construction of the boiler room?

A. That room should be worth about \$10.00 per square foot. If I remember correctly, it was about 13 by 17, or 14 by 17. Has that been brought out, what the exact dimensions are?

Court: It has been mentioned several times. You better look at the specifications. [586]

Mr. Anderson: I believe that was 14 by 17.

Court: You better be sure, because one witness, Mr. Rivers, based his testimony on certain measurements and we found they were not actual.

Q. Would you look at the plan here, Mr. An-

(Testimony of Lorn E. Anderson.)

derson, before you testify, which is Plaintiff's Exhibit 4F?

A. It is 17 feet by 13 feet 4 inches. Estimating what that room is worth at about \$10.00 a square foot, that would make a total worth of about \$2,210.00, less the foundation walls, which he has here, which are, let's say, 17 plus 13 would be 30 feet long by 3 feet high, and your foundation of one foot, which is worth about \$2.50 a square foot, or about \$300.00. That would make a net of \$1,910.00 approximately.

Q. Would that include the contractor's profit?

A. Yes, sir.

Q. Then, in your opinion, Mr. Anderson, is a charge of \$1,509.84 a fair and reasonable charge for the extra work in installing the boiler room?

A. Yes, sir.

Q. Did you prepare all of the specifications that are specified in this litigation, Mr. Anderson? All the specifications?

A. I did not prepare them all personally. I had hired personnel under me that did prepare all of them.

Q. Are you familiar with all of them, then?

A. Yes, sir.

Q. Directing your attention, Mr. Anderson, to page SW-1 again—the last sentence in the first paragraph, which reads: "This work shall include a concrete apron by the gas pumps, but shall not include the wallboard or finish carpentry on any interior partitions, with the exception of the shower

(Testimony of Lorn E. Anderson.)

room and one restroom." I believe the original plans called for a block wall across the middle of the building, did they not?

A. Yes, a block fire wall.

Q. How high was that wall to be?

A. As I remember, it is eight feet.

Q. Did the plans and specifications contemplate any partition or wall to be constructed above that height of eight feet?

A. Not in this contract, no.

Q. Do you know what type of wall actually was constructed?

A. Yes, I have been in the building since and there is a frame wall. I don't remember just exactly what it consists of.

Q. Do you know with whose permission that change was made? A. No, I don't.

Q. Did you ever have any discussions with Mr. Gothberg about it? A. No, I haven't.

Q. Did you have any discussion with Mr. Carr?

A. No. [588]

Q. Does the existing partition go beyond the height of eight feet, Mr. Anderson?

A. I don't remember.

Q. Now, going back to this portion of the specifications that I directed to your attention. Would you explain to the jury what work on the interior portion of the building would constitute extra work? Would you like to look at the floor plan before you try to answer? A. I believe I better.

Court: I think before we go into that we ought

(Testimony of Lorn E. Anderson.)

to take a recess. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty and the court will stand in recess for 10 minutes.

Whereupon the court at 3:55 o'clock, p.m., recessed until 4:05 o'clock, p.m., at which time the following proceedings were had:

Court: The record may show that all jurors are present. The witness may resume the stand and counsel may proceed with examination.

Q. Mr. Anderson, I will ask you how high the partition across the building was, according to the original plans and specifications. Are you able to state how high it is?

A. That was a block wall eight feet high.

Q. Did the plans provide for going on up above that at all?

A. No, they did not. The part above that was not considered [589] in this contract. They wanted it for storage space up there and it was considered that the fire wall was put in at eight feet high in order to catch any flash fires, or such, that might burn up your garage part. This fire wall would protect people in the show room and give them a chance to get out in case there was a gasoline fire or quick fire back there.

Q. Now, was any finished carpentry in the interior, under the plans and specifications, included within the \$38,000 contract? A. Yes.

Q. What portion?

A. There was a shower room, a wash room for

(Testimony of Lorn E. Anderson.)

the men in the back; also one restroom. Although there are two shown on the plans, only one restroom was to be finished. It also included the outside finish carpentry around the windows and so on, and also included the outside doors had to be put in in the show room part of it. All the finish carpentry had to be done in the work part of the garage.

Q. Including the show room?

A. No, not including the show room. Just the back, approximately 70 feet, I think it was, or 68 feet—the back part there.

Q. At the time the contract was let, did you make any estimate of the amount of cost that would be required to finish the [590] portion of the building that was not included within the scope of the specifications?

A. No, we had not made a complete estimate on that at that time.

Q. Are you able, for the benefit of the jury, Mr. Anderson, to arrive at a computation of the amount of the total cost of finishing the interior portion of the building, that was not included within the scope of the contract?

A. The finish work in the show room part would run approximately \$5.00 per square foot for that finish work.

Q. Approximately what would that cost be then?

A. That would be about \$7,500.00 for all the finish work.

Q. Would that include the small partitions in

(Testimony of Lorn E. Anderson.)

the office space and everything, part of which was done by Husky Furniture?

A. Yes, that would include the two offices, the counter for the parts room and also include all the finish on the walls, the furring, the hanging of the ceiling, the trim of the doors and the windows, that is, the mill work around the doors and windows. Well, all the finish work in there.

Q. In your opinion, Mr. Anderson, would the figure of \$5,351.74 be a fair and reasonable cost for the interior finish work that was done by Mr. Gothberg?

A. I am not familiar with exactly what was done by Mr. Gothberg.

Q. Would that be a fair figure, exclusive of the work that was [591] done by the Husky Furniture for the rough-in finish work that was not within the scope of the contract?

A. Would you tell me what Husky Furniture did?

Court: Counsel, a little while ago was seeking to keep all of this out. Now, does he want to bring in Husky? If he does, go ahead. It doesn't matter in the least to me.

Mr. Arnell: I think, your Honor, it is proper rebuttal.

Court: All right. Go ahead.

Q. There has been testimony before the court, Mr. Anderson, that Mr. Carr paid the Husky Furniture Company approximately \$2,700.00 for certain finishing work, which I think included the

(Testimony of Lorn E. Anderson.)

plywood finishing, and the finishing around the office and in the parts room?

A. Well, that would leave about \$5,000.00, or approximately \$5,000.00 for the rest of the finish work done then, in that show room.

Q. Would that, in your estimation, be a fair and reasonable figure?

A. I would say it would, yes.

Q. Mr. Anderson, did the plans and specifications contemplate the installation of a three-paneled door, or three doors, as a part of the original contract, or as a part of the extra work?

A. The scope of the work, as written, excluded the finish carpentry, which would include those doors; therefore, the [592] doors are excluded from the original contract and would be an extra.

Q. Did you design the marquee also, Mr. Anderson? A. Yes, sir, I did.

Q. Are you familiar with the manner in which it was constructed, and the conditions that were incurred during construction?

A. Yes, sir.

Q. Was it necessary to install extra beams or more beams, I should say perhaps, than were available on the job?

A. Yes, there was a channel that ran across the back of the structural member of the marquee, which were 2 by 14 lumber, and that channel was run across the back to support the back of the 2 by 14's, so when snow got on the marquee it wouldn't drop down, and it was also necessary to put in a

(Testimony of Lorn E. Anderson.)

support on the front of the building down to that channel.

Q. Under your interpretation of the specifications, would the cost, and also the installation of the beam, be an additional charge for which Mr. Gothberg would be entitled to reimbursement?

A. The specifications stated there was steel on the job. The amount of steel was not stated. At the time the contract was let, we did not have information as to how much steel was there. My interpretation of the specifications would say that the cost of the beam itself would be extra; however, the installation was required by the contractor.

Q. Are you familiar with the existence of the sign and sign post out on the building, Mr. Anderson? A. I am.

Q. Do you know how that was attached to the structure of the building?

A. Yes. There was a four-inch pipe run out from that 14 inch wide flanged beam. The pipe was welded near the top of the beam and it also had a brace to help support it.

Q. What extra work, if any, did the attaching of that sign beam cause?

A. Well, due to the attachment of that support for the snow, we had to take care of the twisting of that 14-inch wide flanged beam. In other words, you had a web of the beam—the upright member of the beam—you had the pipe attached on to it, which in turn had a tendency to turn over the beam, which made it structurally unsafe. Due to the size of the

(Testimony of Lorn E. Anderson.)

pipe, we had to consider that they could hang whatever weight sign they wanted on that—whatever the pipe would hold. Therefore, we had to fasten from the top of that beam back to the next brace, and on back to the second, in order to keep that 14 inch wide flanged beam from turning over, causing a twisting movement in it, and at the same time that that was done, we used those beams for support over that area. In other words, we could have put [594] something else in, but when this sign was attached, we put in steel and used it for both purposes.

Q. Mr. Anderson, can you state to the jury where the location of the compressor originally was established, according to the plans?

A. The plans showed two compressors there—underneath the work bench along the west wall, and there in front of the shower room.

Q. Was the location of the compressors, or the type of compressors, changed?

A. At the time those two compressors were put in there, under the work bench, we did not know what type of compressor the owner intended to furnish, and the compressor that arrived was bigger than we planned on putting in; therefore, it had to be moved to a place where we could get it in.

Q. Would extra piping and material necessary to change the location of the compressor, then, constitute a flat extra charge?

A. Yes, it is included in that letter I talked about a few minutes ago.

(Testimony of Lorn E. Anderson.)

Q. You mentioned the hoist briefly, Mr. Anderson. What type of plan was originally contemplated so far as the hoist was concerned?

A. Mr. Carr gave us a folder of descriptive literature on a [595] hoist. It had several different types and sizes of hoists in it. The one that was checked in that folder was a one-plunger hoist. In other words, there was just one oil plunger in the center of the hoist to raise the car, and that was originally contemplated in the contract.

Q. What type were installed, if you know?

A. There was one two-plunger hoist installed.

Q. Was there also provision made for another two-plunger hoist?

A. There was provision made for another hoist similar.

Q. Did that constitute an additional charge under the contract?

A. Yes, it would cost more to excavate and put in forms, and so on, for two plungers than it would for one.

Q. Where was the original location of the wash-mobile?

A. In the southeast corner of the building.

Q. In its present location?

A. It is further away from the east wall than originally called for.

Q. Are you familiar with the alteration that was required by the size of the door, Mr. Anderson, with respect to the structural steel?

A. You mean the 12 by 12 door?

(Testimony of Lorn E. Anderson.)

Q. Yes. A. Yes, I am.

Q. Would you explain to the jury what was required as a result of the dimensions of the door?

A. On the 12 by 12 door, it was hung on two steel trusses—between those steel trusses there was a brace that went in. There wasn't 12 feet between the wall and that brace. Therefore, when the door went up, it would hit that brace and not completely open. It was therefore necessary to move that brace back further towards the center of the building in order to make room for that 12 by 12 foot door in a raised position.

Q. Mr. Anderson, was there any change in design in the size or type of the locker rooms or type of fixtures put in them?

A. The locker room, as installed, is not as designed. However, I don't know what changes were in that. I am not too familiar with it.

Q. Was the concrete ramp in front of the building enlarged or extended, or do you have any knowledge of that? A. I don't remember.

Q. Are you familiar with the type of heating equipment in the building?

A. Generally, yes.

Q. Was the original design of either the old or a portion of the heating equipment changed as a result of any alteration in the building or in partitions? A. Not that I know of.

Q. Mr. Anderson, I hand you Plaintiff's Exhibit 9, which is a [597] list of the charges that had been submitted to Mr. Carr. I think those were all

(Testimony of Lorn E. Anderson.)

included within your letter of December 18th.

Would you state what the first item is?

A. Item A, as listed here, is one 8 by 8 door in the south wall.

Q. What is the charge set opposite that?

A. \$211.99 total.

Q. Does that include the door, and also the labor of installation?

A. Door, freight, delivery charge, jamb, and stops—and labor.

Q. In your opinion, Mr. Anderson, is that a fair and reasonable charge? A. Yes.

Q. What is the next item?

Mr. Bell: What is he looking at?

Mr. Arnell: Plaintiff's Exhibit 9.

A. Item B is "Two plate glass, the molding, the freight, frame and trim, and 15 hours of labor."

Q. What is the amount? \$259.59.

Q. What does it include?

A. It includes the glass, the molding, freight, frame, and trim, and the labor.

Q. In your opinion, is that a fair and reasonable charge?

A. I don't rightly know the price of glass. The labor looks in [598] order.

Q. And what is the next item?

A. Item C is "Platform for air compressor, lumber, labor—12 hours at \$3.55—total, \$57.40.

Q. Is that a result of the relocation of the air compressor?

A. From the previous document I read, I would

(Testimony of Lorn E. Anderson.)

imagine this is the platform specified in that document. It doesn't say what the platform is, but that platform was put in for the compressor.

Q. In your opinion, is that a fair and reasonable charge?

A. That is approximately correct.

Q. What is the next item?

A. "Relocate pumps, \$13.63."

Q. Is that a fair charge for moving the pumps, in your opinion, or do you have any personal knowledge—

A. I don't know just where they were moved, or how much. I don't know whether that is a fair price or not, without further description of the actual work accomplished.

Q. What is the next item?

A. "Install two-plunger hoist in lieu of one-plunger, plumbing, 40% of bill, \$189.49; labor—28 hours at \$3.18, for a total of \$164.84."

Q. In your opinion, Mr. Anderson, is that a fair and reasonable charge for extra and additional work? A. Yes. [599]

Q. What is the last item on there, Mr. Anderson?

A. The last item is beam and three-column concrete, 5 yards, including pouring at \$39.75, lumber framing, rods and buttons, steel—185 pounds at 10c, labor framing, 62 hours at \$3.55, labor, 11% insurance and tax on \$504.39—wait a minute, that was not part of the item. The total is \$480.18.

Q. Is that the work you previously described on

(Testimony of Lorn E. Anderson.)

the columns on the steel beam across the windows in the front of the building?

A. I would assume that was the spandrel in the columns.

Q. In your opinion, Mr. Anderson, does that represent a fair and reasonable charge for that extra work?

Mr. Bell: Object for the reason that he has never seen the work and he doesn't know anything about it. He says he hasn't seen it.

Court: If you haven't seen it, sir, you are not eligible to answer.

Q. Have you seen the columns in the concrete beam? A. Yes.

Court: Objection overruled. You may answer.

Mr. Bell: May I ask a question. When did you see it?

Mr. Anderson: I have seen it several times. I saw the building approximately twice a week up until sometime in January, sometime shortly after the 20th of January, and I have [600] seen it several times since. I have been in the building approximately five times since that time.

Court: The objection is overruled. The witness may answer.

A. On the basis of the unit prices and the quantities given here, it is a correct figure, or it is an approximately right amount.

Mr. Arnell: Your witness.

Court: We have another matter coming up. In fact, the party should be here now, and before we

start cross examination, I think we will continue the trial until tomorrow morning at 10:00 o'clock. Ladies and gentlemen of the jury, you will remember the admonitions of the Court as to duty, and the trial of this case will be continued until 10:00 o'clock tomorrow morning.

Mr. Arnell: Can you be here, Mr. Anderson?

Mr. Anderson: Yes, sir. I would rather leave now, if I can.

Whereupon at 4:30 o'clock, p.m., October 1, 1952, the trial of the above entitled cause was continued until 10:00 o'clock, a.m., October 2, 1952.

Be it Further Remembered, That at 10:00 o'clock, a.m. October 2, 1952, the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, except Mrs. Ellen [601] Curtiss, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceedings were had:

Court: Mrs. Curtiss had reported by telephone that her son is seriously ill and she is obliged to remain with him, and therefore she will be excused and the remaining alternate juror will serve as a regular juror—Mrs. Linder. The witness may resume the stand.

Mr. Arnell: If your Honor please, we have Mr. Young. He was here yesterday afternoon, and he is obliged to leave before noon, and Mr. Bell has agreed that he be put on.

Court: Very well. He may come forward.

Whereupon,

KEITH F. YOUNG

was called as a witness on behalf of the plaintiff, and after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Arnell): Would you state your full name, Mr. Young, please?

A. Keith F. Young.

Q. And what is your occupation?

A. I am manager and partner in Anchorage Installation Company.

Q. How long have you been associated and engaged in that business, Mr. Young?

A. I have been in that business for approximately eleven years in Anchorage. [602]

Q. Are you personally acquainted with both Mr. Gothberg and Mr. Carr? A. Yes, I am.

Q. How long have you known each of them?

A. I have known Vic Gothberg for about six years, and I have known Mr. Carr for approximately five years.

Q.- Has your firm ever had occasion to do any contract work, or sub-contract work, in the building known as the Nash Garage?

A. Yes, our firm had a sub-contract under Gothberg Construction Company in the subject building.

Q. Would you describe briefly to the jury, Mr. Young, what the scope of your work was under that contract?

A. The approximate scope of our work included

(Testimony of Keith F. Young.)

the installation of a complete steam heating system, with controls, piping, heat exchanges, and installation of plumbing fixtures, pipings and drains, that were specified on the job.

Q. Did your firm install an air compressor that is located in that building?

A. That I do not remember. If we did, it was not part of our sub-contract. It may have been an extra item. I don't specifically remember the air compressor.

Q. Did you do the plumbing work in connection with the washmobile? A. Yes, we did.

Q. Did you also do the plumbing work in connection with the installation of the heating units?

A. Yes.

Q. Mr. Young, did you install any of the thermostats in connection with the heating equipment?

A. No, we did not. The thermostats were to be furnished by us and they were to be installed by the electrical contractor, and we would furnish as many thermostats as the electrical contractor wanted, up to the number that were actually specified on the job.

Q. Mr. Young, I hand you Defendant's Exhibit I, and ask you to examine the two statements attached to that exhibit. Are those duplicate statements which your firm sends to people who do business with you? A. That's right.

Q. Now, would you examine the organe statement, and state what work, as you recall, that statement represents?

(Testimony of Keith F. Young.)

A. This is a work order and these work orders are made out in response to a telephone request for work by a customer, and the nature of the work described here states furnished labor and material to install air lines, and relocation of water line in front of building. It is my recollection that there is an extra work order signed by Mr. Carr in existence that covers this particular job.

Mr. Bell: I move to strike that, your Honor. It is not [604] responsive to the question at all and for the further reason that the work order, if it exists, would be the best evidence.

Court: The motion is granted on the second count. The work order is the best evidence.

Q. Mr. Young, I hand you Defendant's Exhibit 13, and ask you to examine it.

A. This is the work order to which I referred a moment ago. An order for extra work ordered by the owner——

Mr. Bell: I object to the witness making a speech. He is not answering the question. He was asked to identify the document.

Court: Overruled.

Mr. Bell: Exception.

Q. Would you identify th edocument, Mr. Young, please?

A. It is an order for extra work ordered by the owner, and to be billed to the owner, and it is labeled No. 1.

Q. Is that work order the basis of the state-

(Testimony of Keith F. Young.)

ment contained in the other defendant's exhibit, which I submitted to you?

A. That's right. It is a work order that covers this work.

Q. Can you state, Mr. Young, whether or not the work covered by this order, also the billing, was included in Mr. Gothberg's contract, or whether it would be denominated an extra?

Mr. Bell: I object as a conclusion of the witness and he is not qualified. [605]

Court: He can say whether his company contracted with Mr. Gothberg originally to do that work, but he is not qualified to say what is in the Gothberg contract with Carr.

Q. Mr. Young, was the work, which was performed in accordance with these two exhibits, done after you had completed your contract with Mr. Gothberg?

Mr. Bell: Object to that as calling for a conclusion of the witness as to whether he had completed his job or not. That is his opinion.

Court: Overruled.

Mr. Bell: Exception.

A. I can state that the work covered by this extra work order was not part of our sub-contract with Vic Gothberg. Your Honor, may I elaborate on that statement?

Court: Yes, go ahead.

A. The mere fact that there is an extra work order in existence, signed by Mr. Carr, proves to me——

(Testimony of Keith F. Young.)

Mr. Bell: Object to the assumption of the witness. That is not testifying to a fact, but making an assumption.

Court: That is your own conclusion, sir. The objection is sustained.

Q. Mr. Young, I hand you Plaintiff's Exhibit 12, and ask you to examine it, and state whether or not you can identify it?

A. Yes, I can identify it. [606]

Q. Do you recall receiving that document?

A. Yes.

Q. Now, I hand you Defendant's Exhibit P, and ask you to examine it first. Is the statement attached and part of Exhibit P, a statement of your firm—an invoice or billing?

A. That is right.

Q. Is that the statement that was sent to you after the work called for by the work order, which you have also before you, was done?

A. The dates would indicate that that was the case.

Q. Would you examine your invoice and state what work is represented by that invoice?

A. The work covers the following notation: "This valve damaged by employees of the garage. This work chargeable to the establishment as it was not a case of faulty original installation."

Q. Did your firm deal directly with Mr. Carr on this particular job? A. That's right.

Q. Mr. Young, I hand you Plaintiff's Exhibit No. 10, and ask you to examine the invoices which

(Testimony of Keith F. Young.)

are a part thereof. Mr. Young, are the two colored pages, attached to that exhibit, invoices or billings issued by your firm? A. That's right.

Q. Would you examine the first invoice and state what work [607] that invoice covered?

A. The first invoice covers "the installation of drain piping on sand trap as per extra."

Q. Do you recall the location of that sand trap?

A. I don't recall the exact location of it. All I recall is that we were ordered to put in a sand trap. It was not part of our original contract.

Q. Would you examine the next statement and state what work is covered by that invoice?

A. This work order covers the extending of the gasoline tank vents as ordered by Mr. Carr. It says to be charged to the owner.

Q. At the time that work was done, had similar work previously been done?

A. That's right.

Q. And this was the result of the change ordered by Mr. Carr, was it?

Mr. Bell: Object to it as leading and suggestive. The question is leading, I believe.

Court: Yes, we have had a lot of leading questions, Counsel, on both sides. The objection is overruled.

Mr. Bell: Exception.

Q. Prior to that date, had the gas tanks been hooked up by your firm?

A. That's right. [608]

Court: Nevertheless, Counsel should avoid lead-

(Testimony of Keith F. Young.)

ing questions. They are never in order in this jurisdiction except in cross examination, and in special occasions where it is the only way to get at a subject.

Q. Mr. Young, under your contract with Mr. Gothberg, you were required, were you not, to furnish all of the heating units?

A. That's right.

Q. Do you recall whether or not all of those heating units were furnished?

A. To the best of my knowledge they were. I may have to elaborate on that a little bit to explain how such things occur.

Q. During the course of your work, were there any changes made, either in location of the units, or in the type of units that were installed?

A. I can't definitely state that that was the case. The job has been a long time ago and there has been many jobs since. We ordinarily would——

Mr. Bell: Object to what he ordinarily would have done. The question has been answered.

Court: Overruled. You may answer.

Mr. Bell: Exception.

A. We ordinarily would do just what the scope of our contract called for, and if we didn't do what the scope of our contract called for, it would be because we were ordered not [609] to by the contractor.

Mr. Bell: I move to strike the answer as incompetent, irrelevant and immaterial, and purely an argument and not an answer.

(Testimony of Keith F. Young.)

Court: Overruled.

Q. Mr. Young, to the best of your knowledge, did you fully and completely perform your contract with Mr. Gothberg? A. That's right.

Q. Mr. Young, are you familiar with concrete floors, insofar as they relate to plumbing, and the drainage of the plumbing system?

A. That's right.

Q. What is the customary area for a single floor drain, Mr. Young, so far as you know, in relation to your business?

Mr. Bell: Object as incompetent, irrelevant and immaterial. He is not an expert on floor drainage, and he is not qualified to give answers of that kind.

Court: The objection is sustained.

Q. Mr. Young, how long have you been in the plumbing business?

A. I have been in the plumbing business for 22 years.

Q. Have you been so engaged continuously?

A. That's right.

Q. During that period, have you ever designed floor drainage systems?

A. Very many of them. [610]

Q. Where did you do that type of designing?

A. Anchorage; Richmond, California; Billings, Montana, and Portland, Oregon.

Q. Did that designing work, that you have described, include the drainage of garages?

A. That's right.

Q. Now, I will ask you again, Mr. Young, what,

(Testimony of Keith F. Young.)

in the practice of designing garage floors and drainage, is accepted as the usual allowance for floor drains?

Mr. Bell: Object to it as incompetent, irrelevant and immaterial, and the witness is not qualified to answer and has not been qualified.

Court: Overruled.

Mr. Bell: Exception.

Court: You may answer.

A. So far as floor drains are concerned, we consider—and I am speaking from the standpoint of the plumbing contractors—that we cannot get adequate drainage in any plain surface of concrete if we have over 400 square feet draining into a single drain, without having excessive pitch in the floor. I consider excessive pitch as anything over 3/16ths of an inch to the foot.

Mr. Arnell: No further questions.

Court: Counsel for defendant may examine. [611]

Cross Examination

Q. (By Mr. Bell): Mr. Young, did you state that you had only known Mr. Carr three or four years, or what did you state?

A. I said five years.

Q. You are sure that you have not known him longer than that? A. No, I am not.

Q. Did you buy tires from him in the years of 1943 and 1944? A. That I couldn't say.

Q. Well, to refresh your memory, did you buy some tires in which some trouble came up between

(Testimony of Keith F. Young.)

you and Mr. Carr in trying to collect for them in 1943 or 1944? A. Not that I recall.

Q. Did you ever talk to Mr. Carr while you were on the job down there doing that work?

A. I think probably on about two occasions.

Q. Where were you when you talked to him?

A. I don't recall. It was probably in the subject building.

Q. Well, do you now tell the jury that you didn't ever talk to him at all?

A. Twice, that I recall.

Q. Tell the jury where you were standing, and when it was that you talked to him?

A. I don't remember.

Q. But you do remember, specifically, that you talked to him, and now you can't tell the jury where you talked to him, [612] is that right?

A. I say that I don't remember, because I would talk to Mr. Carr whenever I happened to see him, or on any occasion. It may have been in his shop or his new building. There is a lot of water under the bridge since this was done, and I have known Mr. Carr for five years, and I can't recall any specific conversation we had whatever.

Q. Don't you think it is strange that you can tell the jury you talked to him two times, yet you can't tell us any time or place where you talked to him?

Mr. Arnell: I wish to interpose an objection. The question is argumentative, and it is repetition. It was asked three times.

(Testimony of Keith F. Young.)

Court: Objection sustained.

Mr. Bell: Exception,

Q. Did you ever do any of the work down there yourself? A. No.

Q. Who did the work?

A. My mechanics.

Q. How many drains are there in the floor?

A. I don't know. I haven't examined the plans or the job since it was completed.

Q. You told the jury it would not probably drain if it had more than 400 square feet to the drain, didn't you?

A. I didn't refer to this just specifically. [613]

Q. Did your company put the drains in that were put in there?

A. Presumably, we did.

Q. And you don't know how many you put in?

A. That's right.

Q. Mr. Young, they wouldn't drain if the water couldn't get to them on account of the unevenness of the floor there, would they?

A. That is right.

Q. You still have money coming from Mr. Gothberg on this job?

A. No, we have been paid in full.

Q. When were you paid?

A. I can't state the exact date because I don't carry the data with me, and I would have to check with my bookkeeper. Presumably, in the ordinary course of events, we would be paid 30 days after the contract was completed.

(Testimony of Keith F. Young.)

Q. You signed his attachment bond that was filed in this case, didn't you? A. Right.

Q. And you do have a personal interest in this matter for some reason, don't you?

Mr. Arnell: Object to that question. It is beyond the scope of any direct examination, and it is immaterial.

Court: Overruled. It goes to the credibility of the witness—his interest in the matter, if any.

A. I have a personal interest in it in this respect, that I [614] have done contracting for Mr. Gothberg. He asked me to sign the bond and I did. If Mr. Carr had asked me to do likewise, I would have done the same for him.

Q. Now, you were familiar with these plans, weren't you, when you bid on this job for Mr. Gothberg?

A. I do many jobs. I don't examine the plans. I hire estimators, foremen and mechanics. My chief function is to try to keep enough money coming into the organization to pay the bills.

Q. Do you know what a thermostat is?

A. Yes.

Q. You stated your company was to furnish the thermostats and the electrical contractor was to install them, is that right? A. That's right.

Q. Do you know how many thermostats you furnished down there?

A. I don't recall without examining the records.

Q. Do you know how many heating units you furnished?

(Testimony of Keith F. Young.)

A. I don't know without examining the records.

Q. You know where the garage is, don't you?

A. That's right.

Q. Have you been inside of it? A. Right.

Q. When?

A. I would say—you mean the exact date? [615]

Q. No, just an estimate. I don't want to hold you to the exact date.

A. I was probably on the job each week during the course of construction.

Q. Not probably. Tell the jury if you were.

A. Yes, I was.

Q. How many times?

A. I can't tell you.

Q. Have you been there lately? A. No.

Q. Do you know how the doors open in connection with the garage?

A. I have an idea of how they open.

Q. All right. Tell the jury where the doors are located?

A. As I recall, there is a double door on the alley side on the southeast corner, and I believe there is an access door on the east side, approximately in the middle of the building, and then there is the main entrance door that opens into the northeast corner of the building.

Q. Do you mean double doors that swing both ways, or do you mean some other kind of door?

A. My recollection is that the door slides up to the ceiling, but I couldn't be sure.

Q. Now, assuming that you have the doors lo-

(Testimony of Keith F. Young.)

cated correctly in a garage—those doors, when they are open, let in cold [616] weather, do they not?

A. That's right.

Q. Is there any reason for separate heating units and separate blowers, in a building like that, to balance the heat up in the place?

A. Yes, there is a definite function.

Q. Is there a necessity for each one of those heating units to have a thermostat in the locality, that is supposed to turn on when the temperature gets to a certain spot?

A. Yes, that is the choice of the engineer that makes the layout. In a small area like that, I would consider one thermostat to control all the heaters in the continuous area.

Q. Wouldn't you consider it warmer in the northwest corner of that building than it would be in the southeast corner, where those doors are being opened all the time?

A. Slightly.

Q. If it was cold outside, what would be, in your opinion, the difference in the degree of heat in there, in the northwest corner of the garage and the southeast corner? What would be the difference in degrees of heat there, normally?

A. If the big door was the only door open, when they opened the large door, the displacement of heat would be relatively small because, in order for the cold to reach the extremity of the room, there would have to be definite movement [617] of air through the cross section of the room, but inside of any building, where you have heating units oper-

(Testimony of Keith F. Young.)

ating, you have static pressure, and in order for heat to circulate there has to be displacement of this air, so if all other openings were closed and only the big doors were open, the difference would be relatively slight.

Q. How big are those two big doors you are talking about?

A. I would guess that the doors are probably 12 feet wide, and possibly 10 feet high.

Q. There is two of those, is there?

A. There is only one, so far as I know.

Q. You referred to the doors, the big doors. Is that sub-divided into two or more doors, or is it just one door?

A. It is just a figure of speech.

Q. Did you tell the jury it would be no colder by that 10 by 12 door than it would be across the building in the corner?

A. There would be a difference, but relatively slight.

Q. That is why thermostats are set at different places, so that the heating units will blow heat into the spot that is cold, and not blow it into the spot that is warm, isn't it?

A. That is a matter of the engineer on the job—how he designs it.

Q. If the engineer designs it that way, it should be done that way, shouldn't it?

A. If he designed it that way, and called for that in the contract, [618] it should be done that way.

(Testimony of Keith F. Young.)

Q. Were you there when they put in the drainage at all?

A. I might have been—I don't recall specifically.

Q. You do know there is only one thermostat in the garage, and one thermostat in the show room, don't you?

A. No, I don't know that.

Q. You don't know whether you furnished all the heating units there or not, you say?

A. Unless Mr. Carr has put some in subsequent to our leaving the job, then we did furnish all the heating units.

Q. How do you know that? You say you had not been there for a long, long time. When did you see such a thing?

A. I repeat the statement I just made—that, unless Mr. Carr installed additional unit heaters after we left the job, then we put in all the unit heaters that are required under the contract.

Q. How do you know that? You haven't seen it, have you?

A. Because we would have been notified by the contractor.

Q. You are willing to testify that, because you haven't been notified by Mr. Gothberg, that everything was done right?

A. Yes.

Q. Now, you put in the sand trap in one of those drainage ditches?

A. Right.

Q. Why didn't you put sand traps in the others?

A. Because it wasn't called for.

Q. You only put one in, did you?

A. That's right.

(Testimony of Keith F. Young.)

Q. And charged Mr. Carr for that?

A. Right.

Q. Now, you put in new piping to the washmobile, didn't you?

A. Right.

Q. Why did you do that?

A. Because it was obvious that the pipe line to the washmobile was too small.

Q. And you took those out and replaced it?

A. Right.

Q. And you made Mr. Carr pay you for that?

A. That was not included in the scope of our original contract. It was an extra.

Q. Were you there when that happened?

A. No.

Q. Do you know what happened there?

A. Yes.

Q. Did they take the pipes all out and then say to Mr. Carr, "You have to sign this order or we won't put the new ones in?" Did your men say that?

A. I don't recall the exact circumstances, that is, the statements made regarding the installation. The job was laid out and we put in the piping according to the engineering [620] drawings.

Q. What size pipe did you put in to start with?

A. I am merely guessing again, but I think it was three-quarter or half inch.

Q. And there's lots of water used with the washeteria, isn't there?

A. Sometimes there is very little and sometimes a lot.

(Testimony of Keith F. Young.)

Q. When they are washing a car and it is turned on full, it takes a lot, doesn't it?

A. I imagine so, yes.

Q. You, as a plumber, would know half-inch pipe wouldn't carry enough water to this machine—

A. Certainly.

Q. Yet you just connected it with that type of pipe?

A. As I stated before, it was called for in the engineer's drawings, and we have no latitude in those matters.

Q. Would you please show me something in the engineer's drawings to show me what you relied upon—would you get it, Mr. Arnell, I don't know where it is—where it provides for half-inch pipe. I am handing you BCG 10, which is a part of the plaintiff's exhibit in this—being the plumbing and heating plans. Show me where it called for half-inch pipe to the washeteria?

A. Do you have the specifications? The lines are indicated here, but not on that. [621]

Q. Well, do you want to look at the specifications and see?

A. It may be that on the plans we have that the sizes are indicated.

Q. Well, it is agreed between both the plaintiff and the defendant that these are the official plans, and there is many copies of that exactly, and all three or four copies here in the courtroom are exactly alike, and you can't find anything on the plans to state the size?

A. Not on this.

(Testimony of Keith F. Young.)

Q. All right now. See if you can in the specifications, and then we will discuss them.

A. There is no mention of that in the specifications, and there is no size given on this plan.

Q. Then you were mistaken as to the plans and specifications requiring that small a pipe, are you?

A. I think our plans were identical to these. Then I made a misstatement when I stated half or three-quarter inch.

Q. I see. Now, you do know it was connected with half or three-quarter inch pipe, do you?

A. Yes.

Q. And it was torn out and two-inch pipe line connected, is that right?

A. I don't recall what line was reinstalled.

Q. And that was one of the extras you have charged Mr. Carr for, and he paid you, didn't he?

A. Right.

Q. You required him to sign a statement that he would pay you before you would reconnect it?

A. No.

Q. Didn't you identify an order signed by Mr. Carr for Mr. Arnell a few minutes ago?

A. Your question indicates that we placed pressure on Mr. Carr to sign the order before we would do the work. We merely requested him to sign it, which he did.

Q. You had them tell him—they didn't scream at him, but gentlemenly told him, that you would not connect it unless he signed an order as an extra?

A. We made a civil request that he sign the

(Testimony of Keith F. Young.)

work order, just like he would be requested to sign an invoice if he went in a store and bought merchandise.

Q. Did you talk to Mr. Gothberg about that before you required Mr. Carr to sign that work order?

A. It would naturally be discussed.

Q. But you don't remember whether you did or not?

A. Right.

Q. I see. Now, if it was not connected right then, in the first place, it was Mr. Gothberg's obligation then, to pay for it, wasn't it?

A. Let me point out to you that this pipe size is not specified. If there had been, in the eyes of the engineer, any great [623] necessity for sizing this a certain size, then it would have been on the plan.

Q. But you stated that you know it needs a larger pipe. You knew it then and you know it now, don't you?

A. No, I don't.

Q. Didn't you state a while ago that you knew, then, it should have been a larger pipe, and you put one in?

A. That was after the fact. It says mixing valve. Maybe he was going to have a bucket and mix hot water.

Q. You thought he was going to mix water and throw it on the cars?

A. I didn't know it was going to be used for automobiles.

Q. Did that pipe go in the ground, and then

(Testimony of Keith F. Young.)

come in the wall, and then go up the wall a ways, and then go out again on the outside?

A. Counselor, you ask me about mechanical details on this job and let me state my position again. I did not estimate this job. My men did it, and in order for me to answer mechanical details regarding construction on this job, it would be necessary for me to question the men in my employ who worked on the job originally, and make a thorough research. I have had no preparation on this whatsoever.

Q. Then, when you testified before as to detailed facts in the matter, you were merely testifying as to hearsay? You [624] are not positive about those things?

A. Some items I have specific knowledge of, and some I don't.

Q. Are the ones Mr. Arnell asked you about the ones you have specific knowledge of, and the ones I asked you about, you don't have specific knowledge?

Mr. Arnell: I think the question is strictly argumentative.

Court: Does Counsel object?

Mr. Arnell: Yes.

Court: The objection is sustained.

Mr. Bell: Exception.

Q. If the water pipe did come out of the ground above the ground, and go back into the building and come up through a wall inside, and then go out in the open again, would that be proper instal-

(Testimony of Keith F. Young.)

lation for water to use at a filling station—at the pumps?

A. I don't believe I quite understand your question. You don't make it clear enough.

Q. If naked, uninsulated pipe came above the ground——

A. Is this outside the building?

Q. Outside the building. Would it then be proper installation?

A. That depends on the function of the pipe.

Q. If it was going to furnish water outside for a hose to connect to—would that be proper installation in Anchorage? [625]

A. I am sorry to appear stupid, but I still can't understand what you are proposing in this pipe line—what you are drawing a mental picture of. I just don't get it—I am sorry.

Q. Did you not tell Mr. Arnell, a few minutes ago, that the reinstallation of that valve was due to the fault of Mr. Carr's mechanics?

A. Yes, the handle will only turn 90 degrees in one direction, and if you try to turn it the other way, it will twist off. The man didn't know enough to turn it the other way, and he couldn't get it open and he forced it open, thereby breaking the valve.

Q. Wasn't that due to freezing?

A. No.

Q. It was not? A. No.

Q. Did you see it? A. Yes.

Q. All right. Now, how many heating units did you deliver down there at the place?

(Testimony of Keith F. Young.)

A. The only way I can answer that would be to examine the job material records.

Q. You knew you were going to be a witness today? A. Yes, that's right.

Q. You didn't examine those? [626]

A. No.

Q. I see. How old are you, Mr. Young?

A. I am 41.

Q. And where were you raised?

A. I was raised in Billings, Montana.

Q. What business were you engaged in there?

A. In the plumbing and heating business.

Q. What year did you go in business in Billings, Montana?

A. I was not in business for myself. I worked for the Young Heating and Engineering Company, a business operated by the family.

Q. By your family? A. Right.

Q. Then you went from there to California?

A. I came to Alaska.

Q. Did you come to Alaska first?

A. I came to Alaska, and then went to California.

Q. Then you came back up here?

A. I was in a few places in the interim period.

Q. Now, Mr. Young, if there is 3,500 feet of floor space in the garage, and there is seven drain pipes, or seven catch basins and drains, would that, in your opinion, be enough to make the floor drain, if the floor was right?

A. Well, if I was responsible for the layout, I

(Testimony of Keith F. Young.)

would limit it to 400 square feet to the drain. [627]

Q. If it is less than that, it is an engineering defect? A. In my personal opinion, yes.

Court: Ladies and gentlemen of the jury, during the recess, you will remember the admonitions of the Court as to duty, and the court will stand in recess for 10 minutes.

Whereupon the court at 11:02 o'clock, a.m. recessed until 11:12 o'clock, a.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel may proceed with examination of the witness.

Mr. Bell: That is all, your Honor, on cross examination.

Court: Is there any redirect examination?

Mr. Arnell: That is all.

Mr. Boward: Mr. Young, on the installation of the sand trap, if that was not a part of the specifications and plans, at whose direct request was that installed?

Mr. Young: I have to answer that in a round-about way. Presumably, that is to say, in most cases the mechanical subcontractor, when he takes a job under a general——

Court: If you don't know, you better say so. It is all right, at times, to show the practice or custom but, if you don't know, the answer should be——

Mr. Young: The direct request came from Mr. Gothberg.

(Testimony of Keith F. Young.)

Mr. Boward: On the washmobile water line, the instructions [628] with the washmobile and the volume of water it would take, would that indicate the size of the pipe, even though the plans and the specifications did not?

Mr. Young: Yes, it would, but we didn't have that data.

Court: That is all, Mr. Young.

Mr. Bell: Just a moment.

Recross Examination

Q. (By Mr. Bell): Did you ever see the plans and specifications that were furnished with that washmobile at any time?

A. After the fact.

Q. After the fact? You mean, after it had been improperly connected and was torn out, or when did you see them?

A. After the piping you referred to was completed. We had no idea what the function of this mixing valve was at the time we laid the lines.

Q. Who had those plans and specifications?

A. I don't know.

Q. When you put those in, was the washmobile on the place?

A. No. All it says on the plans—it shows two lines coming across the building, dropping down, and it had a sample, and it said mixing valve.

Q. Was the washmobile itself there on the grounds at the time you were working there?

A. Not that I know of. [629]

(Testimony of Keith F. Young.)

Q. Did you look for it?

A. Well, we wouldn't look for it, because we wouldn't connect it. We would have no idea about it.

Q. Well, it was there in the building?

A. Maybe. I don't know, Counselor.

Mr. Bell: That's all.

Mr. Kurtz: Did I understand you to say that Mr. Gothberg instructed you to install the sand trap?

Mr. Young: Yes.

Mr. Kurtz: To whom did you send the bill?

Mr. Young: I sent the bill to Mr. Gothberg.

Mr. Kurtz: As part of your contract?

Mr. Young: No, as extra work.

Mr. Kurtz: That was not included in any bill that you sent directly to Mr. Carr then?

Mr. Young: No.

Court: That is all. Mr. Anderson may resume the stand and Counsel may proceed with examination.

Mr. Arnell: Your Honor, may I have permission to ask this witness one or two more questions?

Court: You had not closed, so far as I know.

Mr. Arnell: I think I had last night.

Court: Yes, you may. Yes, you had closed—I remember now. Well, Counsel for plaintiff may proceed.

Mr. Bell: Your Honor, we have a very busy man from over [630] at the City that has been sitting here at my request. He has that Building Code, and if you would consent, I would like to ask this

witness to step down and put him on, and let the man get away.

Court: Very well. You may come forward and be sworn. This is a witness on behalf of defendant.

Whereupon,

HARRY M. McKEE

was called as a witness on behalf of the defendant, and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Bell): State your name, please?

A. Harry M. McKee.

Q. Mr. McKee, are you an official in connection with the administration of the Building Code in the City of Anchorage?

A. I am a building inspector, not an official.

Q. Is it your duty to inspect buildings and structural works in the City? A. It is.

Q. And as such, are you in possession of the Building Code of the City of Anchorage?

A. I am.

Q. Are you familiar with the garage in question here—the Nash Garage at the corner of Fifth and Denali? A. No, I am not. [631]

Q. Do you have the code with you, with relation to foundations for buildings similar to that, or a concrete, we will say, one story concrete building?

A. Yes.

Q. Would you please tell us what the requirement is and what section there describes that particular thing?

(Testimony of Harry M. McKee.)

Mr. Arnell: If your Honor please, I would interpose an objection to that question upon the grounds that full foundation has not been laid for the question. After all, this occurred in 1950, almost two and one-half years ago.

Court: Yes, the building, as I understand, is not a concrete building. It is a concrete foundation and pumice block. I think we ought to see if this code was in effect in 1950. Do you know?

Mr. McKee: Yes, it was.

Court: That satisfies that. The objection is overruled. The witness can testify.

A. Section 2805(a) — “Footings and Foundations: Footings and foundations, unless specifically provided, shall be constructed of masonry or concrete, and shall in all cases extend below the frost line. Footings shall be designed to minimize differential settlement.”

Q. Are you acquainted with the frost line in Anchorage—the depth of it?

A. Well, yes. It varies in different parts, though. It just [632] depends what part. You take the overburden off, and it will frost down maybe nine or ten feet. It has been known to go as much as eleven feet in places.

Q. What is the average, say, on Fifth Avenue in the vicinity of Denali, or anywhere in that area? What would be the average there?

A. That I couldn't say, off hand.

Q. Would you permit, if you knew it, the building of a three foot foundation on a one-foot footing

(Testimony of Harry M. McKee.)

for a building at Fifth and Denali Street in the City of Anchorage, knowing that the frost line was similar to what it is at that place?

Mr. Arnell: If your Honor please, we interpose an objection. The witness is not competent to answer the question. It calls for an opinion which he is not qualified to pass.

Court: The objection is sustained.

Q. As I understand the code then, it does require that the fittings and foundations go down below the frost line?

A. That is in the code.

Q. And I believe you stated that the frost line in Anchorage varied from some nine feet, you said, to eleven feet?

A. Yes, and it probably comes back up some place to three feet.

Q. And goes as high as three feet in certain places. Would you explain to the jury why, if you know, that in some places the frost only goes down three feet?

A. A place where the overburden is thick on top and not removed, [633] the frost won't go down. The overburden protects the frost from penetrating in the ground.

Q. Does the disturbance of the surface, and working over the surface, have a tendency to make the frost go deeper?

A. It has.

Mr. Bell: You may take the witness.

(Testimony of Harry M. McKee.)

Cross Examination

Q. (By Mr. Arnell): Mr. McKee, did you examine the City records to determine whether or not a building permit had been issued by the City of Anchorage for this construction?

A. No, I haven't.

Q. Do you have those permits in your office?

A. We have.

Q. Would you be able to produce such a permit if it had been issued? A. Yes, sir.

Q. In the usual course of supervising this type of construction, would a permit have been issued for the construction of that building before it could progress? A. That's right.

Q. Would the permit be based on the original plans and specifications?

A. That's right. If the specifications or the plans were up to the code only. [634]

Q. But if a permit had been issued, would that imply that the City accepted the plans and specifications as complying with the code?

A. That's right. The building official checks the plans and makes the changes and issues the permit. They have to bring them up to the code.

Q. When the permit is issued then, presumably that building complies with the building ordinance then—the Building Code? A. It does.

Q. Mr. McKee, would you please produce the permit that covers this building this afternoon, or could you do it before 12:00?

A. I probably can, yes.

(Testimony of Harry M. McKee.)

Q. I hate to ask you to come back——

Court: Do you require a subpoena to justify you in bringing those papers in, or can you bring them in?

Mr. McKee: I can bring them in.

Mr. Arnell: That is all.

Mr. Bell: That's all.

Court: Mr. Anderson may resume the stand, and Counsel for plaintiff may undertake further examination if he wishes.

LORN E. ANDERSON

Redirect Examination—(Resumed)

Q. (By Mr. Arnell): Mr. Anderson, are you familiar with the provisions of the [635] contract——

Court: Mr. McKee, can you leave that book here long enough so that we can copy out of it what you read. Can you leave it with the Clerk for a little while, and when you come back again, you can pick it up? Will you mark the paragraph so we will know which one it is—just point it out?

Mr. Arnell: May I ask Mr. McKee just one more question? Do you have a copy of the plans and specifications over there?

Court: The witness better take the stand if he is going to testify.

Mr. Arnell: I just want to ask whether or not the plans and specifications were required in your office?

Mr. McKee: They probably are some place, but there is such confusion now. There are plans all

(Testimony of Lorn E. Anderson.)

over the City Hall, but we require a set of plans in the office.

Court: Very well, Mr. McKee. Counsel may proceed.

Q. Mr. Anderson, are you familiar with the provisions of the contract that relate to the occupancy of these premises while they are in the process of construction?

A. You mean occupancy by the owner before the work was completed?

Q. Yes. A. Yes, I am.

Q. Would you explain to the jury what the accepted practice is in situations where the work is under construction, and [636] the owner moves in and takes either partial or total occupancy?

Mr. Bell: Object to that as accepted practice, because in the first place he is not qualified to testify to it in Anchorage, and for the reason that that would be hearsay and a conclusion.

Court: I think the witness has not shown himself qualified as to the practice in this area, if there is any practice here. I don't know enough about building construction to know whether that practice exists anywhere.

Q. Mr. Anderson, where are you working at the Post? A. District Engineers.

Q. What are your duties?

A. Assistant project engineer at the time. We are charged with the administration of lump sum contracts for the Government. In the Project Engineer's Office we take care of the contract from

(Testimony of Lorn E. Anderson.)

its time of bid or the time of acceptance of bid up until such time as the contract is closed out. We take care of such things as questions of change on it, approval of shop drawings, approval of any materials and items of equipment that are to be furnished for the contract, and take care of modifications on the contract, showing the changes.

Q. How long have you been engaged in that type of work, Mr. Anderson? [637]

A. Three years with the District.

Q. Are you familiar with the practices in the construction trade with respect to the owner's acceptance and occupancy of premises under construction?

A. I am more familiar with Government procedure than I am with private procedure. I have been concerned with some private.

Q. Are you familiar with the general practice that results from an owner's occupancy of a building that is under construction? A. I am.

Q. When the building is partially completed, or in the process of final completion, and the owner enters into occupancy of either a part or the whole of the building, will you explain to the jury what the common practices are with respect to the determination of the rights of both owner and contractor?

Mr. Bell: Object. That is giving a conclusion he is not capable of giving, and for the further reason he has not shown himself to be competent, so far, to give any opinion on that.

(Testimony of Lorn E. Anderson.)

Court: I think the objection goes even deeper, and that is that the practice may not govern. The objection is sustained. The testimony sought to be elicited is incompetent and can in no way bind either of the parties to this action. The [638] objection is sustained.

Mr. Arnell: No further questions.

Recross Examination

Q. (By Mr. Bell): Mr. Anderson, I didn't quite catch your statement yesterday as to whether or not you were a registered architect or a registered engineer?

A. I was not asked that question yesterday. However, I am a registered engineer in the Territory of Alaska.

Q. How long have you been such?

A. I received my license in 1949.

Q. Now, Mr. Anderson, how long have you known Mr. Gothberg? A. About four years.

Q. And you have handled several matters for Mr. Gothberg, have you?

A. I have been concerned with Mr. Gothberg on one Government contract, and on this contract. I have known him personally due to this association.

Q. When did you first meet Mr. or Mrs. Carr?

A. I am not sure whether it was late in the fall of 1949, or in the spring of 1950.

Q. And what was the occasion of your meeting them?

A. Mr. Edward A. Smith, who at the time lived

(Testimony of Lorn E. Anderson.)

in the other half of the duplex I lived in, introduced me to them on the basis that Mr. Carr desired a design of a building, [639] and I had a license at the time, and they wanted me to design the building for them.

Q. Now, do you know whether Mr. Gothberg had made the arrangements for you to meet Mr. and Mrs. Carr or not?

A. He might have made the arrangements for Mr. Smith to meet them, but I didn't know.

Q. Now, did Mr. Carr show you a penciled drawing that he had made, and of approximately what he wanted built?

A. I don't remember a pencil drawing. I do remember a plan showing the floor plan of the garage.

Q. Is that the same floor plan that was used in this building? A. Approximately.

Q. I will ask you to look at this little drawing here, and state whether or not the writing along the side on this drawing here, is not your writing, to refresh your memory?

A. It is not my writing.

Q. Did you ever see that drawing before?

A. I don't remember it.

Q. Check it very carefully now, and see if you haven't put some initials on it with your own pencil?

A. I see none of my notations on this plan.

Q. Are you familiar with the notations of your associate that you just spoke of?

(Testimony of Lorn E. Anderson.)

A. Mr. Smith? [640]

Q. Mr. Smith. Do those look like his notations on there? A. I can't say.

Q. You can't say. Now, then, you don't remember ever having seen that before?

A. I do not. I may have, but I don't remember it.

Q. When did you come to Alaska?

A. 1937.

Q. And when did you come to Anchorage?

A. 1943.

Q. And have you been in the Engineer's Office ever since then?

A. No, sir. I went to work for the District Engineer in 1949.

Q. Have you been in the District Engineer's employ constantly since that time?

A. Yes, sir.

Q. And you draw a salary from the Government there? A. Yes, sir.

Q. And then you took this job of doing this work for Mr. Carr, did you? A. Yes, sir.

Q. And what business do you operate in Anchorage or out on the base? What's the name of your business that you operate?

A. I have none at the present time. At that time I was going under the name of Alaska Engineering Supply, as I remember.

Q. You were going under the name——

A. Yes, sir. We had a license to practice under that name. [641]

(Testimony of Lorn E. Anderson.)

Q. And who was the Alaska Engineering Supply? Who was it, really, that was using that name?

A. I was.

Q. And were you incorporated?

A. No, sir.

Q. That was just a fictitious name used by you?

A. It was the name of the company, the same as any other name of a company is.

Q. But it wasn't a corporation—it was just you?

A. Yes, sir.

Q. Was Mr. Smith associated with you in that?

A. He was associated with me, but not as a—well, wait a minute, I don't remember exactly how we worked out the details on it, but I believe we considered ourselves partners.

Q. Was that Edward A. Smith?

A. Yes, sir.

Q. And you are L. E. Anderson?

A. Yes, sir.

Q. Then you made a deal with Mr. Carr to draw these plans and specifications and to do certain work for him?

A. Yes, sir.

Q. What were you to do under the terms of that agreement with Mr. Carr?

A. Under the original agreement, we were to design a building [642] which is now called the Nash Garage at Fifth and Denali, and we also had a partial agreement that we might be called on to do some inspection on that job. The original agreement did not call for inspection.

(Testimony of Lorn E. Anderson.)

Q. Did you have any agreed price with Mr. Carr to do that work? A. Yes, sir.

Q. What was that agreed price?

A. 6% of the estimated contract.

Q. And you explained that to him—that you were to get 6% of the estimated cost of the building, just to draw the plans? A. Yes, sir.

Q. And you tell the jury that he agreed to that, did he? A. Yes, sir.

Q. And did you have any writing to that effect of any kind? A. No, sir.

Q. Was there once a discussion of \$600.00 between you and him?

A. There was a discussion. I don't remember the amount as being \$600.00—it was somewhere around that figure.

Q. Yes. Now, do you know about the date of that discussion?

A. I couldn't remember the exact date. To the best of my memory it was sometime in September.

Q. Of 1950? A. 1950. [643]

Q. Now, I hand you a check that is payable to Alaska Engineering Supply and will ask you to state whether or not you have seen that check?

A. I have seen it.

Q. Did you receive the money that was covered by that check? A. Yes, sir.

Q. And what amount? A. \$2,725.71.

Q. What part of that did you receive, individually?

A. I couldn't state the exact amount that I re-

(Testimony of Lorn E. Anderson.)

ceived individually. I received approximately half of it.

Q. Well, would it be within a few dollars of half of that, one way or the other?

A. That would be approximately the amount.

Q. Who received the other half?

A. Mr. Smith.

Q. Was anyone else given any money out of that? A. No, sir.

Court: Mr. McKee is here again.

Mr. Bell: We will put him right on.

Court: You may step down, Mr. Anderson. Mr. McKee, if you are ready, you may take the stand now so that you will not be detained here. As long as Mr. McKee is here, I wonder if Counsel would object to putting into evidence, as an exhibit, the part of the building code read by Mr. McKee. I have had [644] a copy made and I can give copies to Counsel. Perhaps they better examine that first, and if there is no objection, we will mark the original as an exhibit, so the jury will have the exact language when they go out to consider their verdict. Mr. Arnell may proceed with examination of the witness, Mr. McKee. He is plaintiff's witness, I understand.

Whereupon

HARRY M. McKEE

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. McKee, do you have

(Testimony of Harry M. McKee.)

with you the permit, which was issued by the City of Anchorage, authorizing the construction of the Nash Sales and Service building? A. I have.

Q. When was the permit issued?

A. 8-28-50.

Q. Does that permit refer to any specific set of plans? A. Yes.

Q. Does it designate them?

A. No, it was sent to the Pacific Coast Building Conference for check.

Q. What action was taken after that?

A. After the return from the Conference, with all the changes made, the building permit is issued, with the changes according to the Pacific Coast Building Conference. [645]

Q. Were any changes made in that building?

A. It doesn't say on this. We would have to get the plans for that.

Q. Perhaps we can avoid that, Mr. McKee, if you can answer this question. Because of the fact that the building was constructed in accordance with the plans that are in evidence, now can you state to the jury, is it your presumption that there were no changes in the design?

Mr. Bell: Object as incompetent, irrelevant and immaterial, and calling for an opinion of the witness, who has stated he would have to have the plans to determine that.

Court: I don't see how the witness could possibly know.

Mr. Arnell: Since counsel has objected, your

(Testimony of Harry M. McKee.)

Honor, I would like to ask Mr. McKee to produce the plans that were used.

Court: Do you think you can get the plans?

Mr. McKee: It might take a day to find them, if they are around.

Court: This case won't be finished today.

Mr. Arnell: May I look at that?

Mr. Bell: If Mr. Arnell doesn't object, we will both look at it at the same time and save time.

Q. Mr. McKee, under Item 17, I believe it is, would you read that?

Mr. Bell: Object to reading from any part of it. If he [646] wants to introduce the whole thing, it is all right, but I object to his picking out one particular part. It would be confusing.

Mr. Arnell: I would like to offer the whole thing.

Court: Is it just one sheet?

Mr. Arnell: Yes.

Court: Why not put in the whole sheet and it can be read by Counsel. We can have copies here. Can you leave it here during the noon recess?

Mr. McKee: Yes.

Court: Have you any of those blank sheets? Most of it is printed.

Mr. McKee: I will see if I can get hold of these old blanks. We have new ones now. There may be some over there, I will look.

Court: All right. You may take it with you, and if you can find an old blank, come back this afternoon at 2:00 o'clock with that sheet, and with a copy of it, and after Counsel look at the copy, perhaps

(Testimony of Harry M. McKee.)

we can admit the copy in evidence. Do Counsel consent to admission in evidence of part of the Uniform Building Code?

Mr. Bell: I do.

Mr. Arnell: No objection on my part, your Honor.

Court: It may be admitted as Defendant's Exhibit S.

Mr. Arnell: Your Honor, perhaps we could stipulate that [647] we could pick up the copy there and avoid calling Mr. McKee back.

Court: Will counsel stipulate that the copy to be furnished by Mr. McKee is a copy?

Mr. Bell: If Mr. McKee signs it with his signature, I will accept it.

Court: All right. If you will use one of the blanks and put what is written in, and sign it as a true copy, you can leave it with the clerk.

Mr. Boward: Would it be permissible to ask Mr. McKee a question?

Court: Yes, indeed.

Mr. Boward: Mr. McKee, the date of the building permit is 8-28-50?

Mr. McKee: That is correct.

Mr. Boward: According to the evidence that has been presented to the Court, the foundation in question, at the present time, was erected previous to that time. Was there a permit issued on that?

Mr. McKee: No, I don't believe there was a permit issued on that.

Court: The contract for construction of the

(Testimony of Harry M. McKee.)

foundation was signed sometime in May, I think.

Mr. McKee: We did have trouble. When we sent these plans out to the Building Conference for a check, the contractor would [648] be held up until the plans were returned with the corrections. In the meantime, they would excavate or prepare for their building. We allowed that for the benefit of the time here you are limited to build.

Court: Will you look and show whether any other permit was issued for the foundation of this building. It seems, according to the testimony here, that the foundations were put in and then the City required that the building be moved back and a separate contract was let for that—to move the front back and the back back to the rear of the lot. Would you look at your records and see if there is any permit issued for that change, or for the original foundation built before?

Mr. McKee: Who had the second contract for setting it back?

Court: Mr. Gothberg had the contract for setting it back. One witness testified as to the name of the firm that had the original contract.

Mr. Bell: It was Breeden and Smith.

Court: Breeden and Smith first put in the foundation and then the City, I think, widened the street. At any rate, it was necessary to move the front and back wall each, to the rear of the lot 12½ feet, and that was done by Mr. Gothberg. It is so near to 12 o'clock now—can you find that in the

(Testimony of Harry M. McKee.)

next three minutes—no, you better look it over. I wonder if the parties are agreeable to coming back at 1:30. Are both counsel [649] agreeable?

Mr. Bell: Yes, sir.

Mr. Arnell: Yes.

Court: What about the jury—I guess they can. All right, come back at 1:30 then. The jury will remember the admonitions of the Court as to duty, and the court will stand in recess until 1:30, and the trial will be continued until 1:30.

Whereupon at 12:00 o'clock noon, the trial of the above entitled cause was continued until 1.30 o'clock, p.m.

Be it further remembered, that at 1:30 o'clock, p.m., the trial by jury of the above entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore; The Honorable Anthony J. Dimond, District Judge, presiding.

And thereupon, the following proceedings were had:

Mr. Arnell: If your Honor please, I have been, since I came into Court, served with an Answer to the Amended Complaint, and as a part of his Answer, Mr. Bell incorporates allegations stating Cross Complaint filed in this action. On my recollection of the pleadings, perhaps the record could stand on that basis. It is understood that our denial heretofore filed in reply to the Cross Complaint would stand as a part of the record, also.

(Testimony of Harry M. McKee.)

Court: That is agreeable with the Court if it is to counsel. I can send the original Answer and the Answer to the Amended Complaint to the jury, and state to the jury that the denials to the Cross Complaint stand as denied——

Mr. Bell: I think that's all right.

Court: ——to the Answer to the Amended Complaint. It may be a bit confusing to the jury. If counsel for plaintiff desires, he may file—I don't know, I will read this. At any rate, unless counsel disagree, that will be done, and if counsel for plaintiff wishes to file an Answer to the Amended Cross Complaint, he may. Mr. McKee is now here. Perhaps we better finish up with him. Mr. McKee, can you come forward and take the stand? Is this paper, which you have given me, a true and correct copy of the original record of the City of Anchorage, concerning the permit for the construction of the building, which has been testified about here?

Mr. McKee: It is.

Court: Without objection, it may be admitted in evidence as certified by Mr. McKee, and it will be admitted in evidence as Plaintiff's Exhibit No. 16.

Mr. Bell: No objection.

Mr. Arnell: Will you waive reading of it?

Mr. Bell: Sure.

Court: Without objection, it will be considered as read. [651]

Recross Examination

Q. (By Mr. Arnell): Mr. McKee, under the

(Testimony of Harry M. McKee.)

designation of 17, there appears an entry, and an interlineation in this document. Would you read that to the jury, please?

A. What part is that?

Q. Under Item 17.

A. "Plans submitted herewith, yes. Specifications herewith. Checked PCBOC OK—Aug. 23, 1950."

Q. If you know, Mr. McKee, will you state to the jury what that interlineation means?

A. We received the plans in the office of the building, and we sent them out to the Pacific Coast Building Conference in Los Angeles. It is an impartial check on plans, regardless of the city or the architect. They check plans and send them back with all corrections to be made on the building, and it is submitted back to the architect to make these corrections before the work can proceed, with the exceptions, sometimes the foundations, or, if the time is limited, we let them excavate for foundations or for footings, but that is what that paragraph is.

Q. Were there any exceptions to the plans, Mr. McKee, that your record denotes?

A. No.

Q. Were there any modifications? [652]

A. There were no modifications.

Q. Did the City require a minor change in any regard?

Mr. Bell: Object to that because he has stated he didn't know. He wasn't building inspector then.

(Testimony of Harry M. McKee.)

Court: If he knows, he can answer. If he doesn't, he can say so.

A. There is no corrections marked on here, outside of building permit was granted.

Mr. Arnell: No further questions.

Redirect Examination

Q. (By Mr. Bell): Mr. McKee, if there were some requirements made, they would have been noted on the plans and returned to the architect, you say?

A. That is correct. We carry a file in the office with corrections, and there is a copy sent to the architect that drew up the plans.

Q. I see. Can you find the plans in this particular case?

A. No, I couldn't.

Q. Would that indicate to you that possibly the plans were returned to the architect for some changes?

A. As a rule, there's one set kept in our office permanent, and the other set that they work on the job is sent to the architect for corrections and put back on the job.

Q. And you can't find either set of plans—these plans—at [653] your office?

A. No. There's plans over there—hundreds of them over there.

Q. Don't you have them numbered, or something, so they will be easy to find, Mr. McKee?

A. We do it now, but they didn't before.

(Testimony of Harry Mr. McKee.)

Q. So you don't know whether there was changes made on the plans or not, yourself, personally?

A. No, I don't.

Mr. Bell: That's all.

Court: That is all, and you may be excused from further attendance. Now, Mr. Anderson may come back once more.

Miss Wise: You didn't say anything about the very first plans or permit that was issued when the first excavation went in. Do you know anything about that?

Mr. McKee: This is the only permit that was on file in the office. That was issued the eighth month, 28th day, of 1950.

Miss Wise: Would that be kind of a retroactive permit, indicating that anything that had been started was permissible?

Mr. McKee: No, anything that happened during the time the plans were being checked, should have been checked by the building inspector, and noted.

Miss Wise: There is no indication of the work permit, or building permit, being issued on the original foundation?

Mr. McKee: This appears to be the only permit issued, and [654] that carried the building through to the finish.

Miss Wise: That's all.

Court: That is all. Mr. Anderson may resume the stand.

Whereupon

LORN E. ANDERSON

resumed the stand as a witness on behalf of the plaintiff, and testified as follows:

Recross Examination

Q. (By Mr. Bell): Mr. Anderson, when did you first meet Mr. or Mrs. Carr?

A. It was either in the fall of 1949, or spring of 1950, I wouldn't know exactly when.

Q. When did you draw those plans that's marked BCG No. 1?

A. I wouldn't remember the exact date.

Q. That is the foundation plan.

A. I don't remember the exact date. I believe there is a date on the plan.

Q. Would you look at this plan and tell the jury when you drew that, if you did draw it?

A. It is dated April 5, 1950. That would be the date of completion of the plan.

Q. April 5, 1950? Is that the first plan, now, that was drawn by you or your associate?

A. This was the first final plan. There were preliminary plans before this, but this is the first final plan.

Q. Where are those preliminary plans?

A. I imagine I have destroyed them. They were merely sketches [655] to give an idea of what we were going to do.

Q. Was that similar to the one you saw here this morning, and said you had never seen it before? Were the preliminary plans similar to that?

(Testimony of Lorn E. Anderson.)

A. No, it would be very similar to the one you have there as BCG 1.

Q. Do you think that is a preliminary plan, or is that one of the final plans?

A. That was a final plan.

Q. And that was dated in April of 1950?

A. Yes, sir.

Q. Now, I am calling your attention to BCG 8. I will ask you to state to the jury the date that you drew that, if you did draw it?

A. It is dated August 21st, 1950.

Q. Now, that is evidently the date that that plan was first brought into existence as a finished plan, wasn't it?

A. That was the date that it was drawn up in the finished plan, made up into the final set, yes.

Q. Now, Mr. Anderson, would you look at this drawing here, in the middle, and tell us what that represents—from there across, and back down to there. Is that steel?

A. That is a 12-foot channel, weighing 20.7 tons per foot.

Q. And that is a steel channel—iron, is it?

A. Yes, sir. [656]

Q. And when you drew this plan, you drew that in there, did you?

A. Yes, sir. I don't believe that I did the actual drawing on this; however, I am responsible for the drawing here.

Q. I will ask you what that instrument is to the right in the middle of the plan, and to the right

(Testimony of Lorn E. Anderson.)

side. What does that represent? It says beam, does it not?

A. That is the 14 inch wide flange—30 pound beam for the door.

Q. Steel beam?

A. Yes, sir.

Q. Then is this the marquee here—the drawing for the marquee?

A. It is a structural drawing for the marquee, and it also has some architectural details on it.

Q. Now, was the contract let to Mr. Gothberg based upon these plans, the whole set of plans, all the way through?

A. Yes, sir. Wait a minute—there were two contracts.

Q. I am speaking of the main contract—September 19th—for the building? A. Yes, sir.

Q. Well, now, please tell me why you told Mr. Arnell that there was no provision for the steel beam at the marquee?

A. No provision for this channel?

Q. Yes.

A. In the specifications—in the scope of the work I believe [657] it is—or in the first part of the specifications, it reads that there is steel on the job. There is no weight of steel shown there, because we did not have the amount of steel, and did not know the amount of steel that was there at that time, and therefore the installation of this beam is a part of Mr. Gothberg's contract. However, from the specifications, the contractor would assume that all the

(Testimony of Lorn E. Anderson.)

steel is there, with that statement that's in the specifications.

Q. But what you mean to say is that your drawings provided for the steel, but that you exempted them by some other clause in the specifications, is that right? A. Exempted the actual steel.

Q. But the drawings shows the very beam that you are talking about?

A. Yes, sir, so that he can install it.

Q. I will hold this up here. Would you step down to save putting it up on the wall again, and just point here and tell the jury—point to the steel beam?

A. This steel channel here—also, the steel channel running across here.

Q. What is this instrument here?

A. This instrument is an angle iron support to hold the end of this channel from lifting up, due to weight at the end of this marquee. [658]

Q. Was the marquee built according to the specifications and plans by Mr. Gothberg?

A. Yes, sir.

Q. Then those pieces of steel drawn in there, are they all in place? A. Yes, sir.

Q. And that is all the steel that you requested, that is drawn there?

A. No, that is not all the steel required on the job.

Q. I mean for the marquee only?

A. That is all the structural steel for the marquee.

(Testimony of Lorn E. Anderson.)

Q. Yes. That is all. Now, I want you to show me the part of the specifications that make that drawing ineffective?

A. I can't show you any such thing.

Q. Well, you said the specifications had some clause that prevented the contractor from having to put that piece of steel, or having to furnish that piece of steel. Now, what in the specifications——

A. There is a statement in the specifications.

Q. Read it to the jury.

A. It's under Special Conditions. Paragraph SC-1, sub-paragraph C: "Structural steel is on site, but is not in place and consists of . . . pounds."

Q. What is there in that to say that he could exempt himself from complying with the plans and specifications? [659]

A. It says structural steel is on site.

Q. Does it say how much, or anything about it?

A. No, sir, because that information wasn't available.

Q. Did you ever see the structural steel plans?

A. I have seen shop drawings of the structural steel, yes, sir.

Q. I believe you stated to Mr. Arnell that you had not seen the structural steel drawings. I will ask you to examine this and see if you haven't seen that yourself?

A. My statement to Mr. Arnell was not that I had not seen the structural steel plans. I believe you misinterpreted my answer.

(Testimony of Lorn E. Anderson.)

Q. I just wanted to know what it was. Have you seen those plans? A. Yes, sir.

Q. When did you first see them?

A. I couldn't answer on the date on that. I would imagine it was probably in August of 1950.

Q. Was that before or after you drew this particular plan that you have just testified about—No. BCG 8? A. About the same time.

Q. Now, I will ask you to examine that plan and see if there is any marquee in that plan at all?

A. No, sir, there is not.

Q. Well, then, you knew there was no marquee in the plan, didn't you, originally? [660]

A. In what plan?

Q. In the steel.

A. This does not represent all the steel that was on the job.

Q. Tell the jury what steel was on the job that is not mentioned in that plan.

A. There were pencil rods; there was webbing for the floor, or 6 by 6 mesh, whichever you want to call it—there is two items. I don't know just what all was on the job now—I don't remember.

Q. But the structural steel is all mentioned right there, and that's what the structural steel was made from, wasn't it?

A. I can't testify that that was all the structural steel on the job.

Q. And you were the architect on the job, and went ahead and ordered everything done, and didn't check the steel and the plans and specifications to

(Testimony of Lorn E. Anderson.)

see what you were doing when you joined the marquee on to that. Is that what you say?

A. I didn't state that.

Q. Well, you did know what the steel consisted of then, before you drew that plan, didn't you?

A. I know what steel was on that, yes, sir.

Q. You knew that was all the steel, outside of the pencil rods and for the webs, that was to go in the concrete, didn't you? A. I didn't say that.

Q. Well, was there any there?

A. Not that I remember at the present time. Those were merely samples that I gave as to other items that were on the job.

Q. I see. Then, so far as you know, the steel that is mentioned in the regular Pacific Car and Foundry Company Plat of that steel here, is all the steel that was there, or all that was supposed to be there on the ground at that time, isn't it? A. No, sir.

Q. Well, now, tell the jury what else there was then.

A. There was pencil rods, mesh for the floors—those are two things I do remember.

Q. I asked you about that. I said exempting the pencil rods and the wire mesh. All the rest of the steel is described in this plat, isn't it?

A. I can't answer that.

Q. Can you read the plat?

A. I can read the plat, yes, sir.

Q. Look and see.

A. This doesn't tell me what was on the job, sir.

Q. But you drew the marquee plans, didn't you?

(Testimony of Lorn E. Anderson.)

A. Yes, sir.

Q. And you provided for steel beams in it, didn't you? [662]

A. Yes, sir.

Q. And Mr. Gothberg took the contract, and agreed to furnish all the material, and to do all work, and finish that job, save what steel was on the ground and what material was there, didn't he?

A. That is not the paragraph I read. It says the structural steel is on the site.

Q. Answer the question. You were supervising it, weren't you, for Mr. Carr at the time, weren't you?

A. At that time, yes, sir.

Q. And you know what the contract was, don't you? A. Yes, sir.

Q. You drew it? A. Yes, sir.

Q. Now, didn't Mr. Gothberg agree to use what material was there and to furnish all additional material under the terms of that contract—to finish that job according to the plans and specifications, which were made a part of the contract?

A. Mr. Gothberg agreed to that part of it, with the exception of the items as listed in the Special Conditions, as were to be furnished by the owner.

Q. All right. Now, show me those Special Conditions.

A. That is the one I just read to you, sir.

Q. Oh, and that one says nothing about the beam then, at all, [663] does it?

A. Not as such.

Court: Counselor, I think we have gone into this

(Testimony of Lorn E. Anderson.)

so thoroughly that the jury understands it without any further examination.

Q. I will ask you, then, if this contract—did you write this contract that has been introduced in evidence here?

A. I was responsible for its being written.

Q. And you know what's in it, don't you?

A. Generally, yes.

Q. All right. Will you read Article I of that contract?

A. "Article I. Scope of the Work—The contractor shall furnish all of the materials and perform all of the work shown on the drawings and described in the specification entitled "Construction of the Nash Garage" consisting of "Scope of Work, General Conditions, Special Conditions and Technical Provisions" prepared by Alaska Engineering Supply, acting as in these contract documents entitled "Engineer", and shall do everything required by this Agreement, the Scope of Work, the General Conditions, the Special Conditions, the Specifications and the Drawings."

Q. I hand you Plaintiff's Exhibit 7. I believe you testified to Mr. Arnell that you wrote that letter?

A. Yes, sir.

Q. What date does it bear? [664]

A. The 28th of December, 1950.

Q. Is that the date that you wrote the letter?

A. Yes, sir.

Q. And when did you deliver it to Mr. Gothberg?

(Testimony of Lorn E. Anderson.)

A. Shortly thereafter. I wouldn't know the exact date.

Q. Then immediately following that letter, those changes were made, were they?

A. No, sir. Actually, some of these changes had been accomplished before the fact of this letter. At the time that some of these changes were required, Mr. Carr asked for this 8 by 8 foot overhead door—Mr. Carr asked that that be accomplished, and we told Mr. Gothberg that should be accomplished. We told him what to do and, in turn, asked him for his proposal on it.

Q. Did you ever get his proposal?

A. I don't believe so. I am not certain of my memory on that.

Q. Do you know when that door was put there?

A. I believe sometime in November. I am not sure of the date on that.

Q. But you are sure it was prior to the time you wrote that letter?

A. Yes, I am sure it was prior to the time I wrote the letter.

Q. All right. Take the second one there. Is that the first one, the 8 by 8 door, the first Article?

A. Yes. [665]

Q. Take the second.

A. "Remove the northwest 3'0" by 6'8" door in the northeast wall and reinstall a 4'6" by 7' plate glass window in its stead."

Q. Do you know when that work was done?

(Testimony of Lorn E. Anderson.)

A. The exact date when this work was done—I don't believe it was before this time.

Q. You believe it was done before the letter was written? A. Yes, sir.

Q. All right. What's the third item on there?

A. Installing a reinforced concrete slab over the stairwell for the compressor.

Q. Now, when was that put in?

A. That was put in after this letter. I don't believe they put in a concrete slab, as I remember. I believe a wood floor was put in later on. I don't know what the agreement was.

Q. You don't think that concrete slab was ever put in there?

A. A wide platform was put in in lieu of the concrete slab. That is the same type of platform that that compressor is sitting on at the present time.

Q. Wasn't that slab—the concrete floor——

A. No, sir.

Q. I see. Something else that you ordered there?

A. Yes, sir. [666]

Q. All right. You don't think that was ever put in?

A. There was a support put in for the compressor. I don't remember whether it is a concrete slab, or whether it is a wood platform.

Q. I see. Now, what's the next one—Number IV?

A. "Move the fuel pumps to a position sixteen inches from the face of the northeast wall."

Q. Do you know when they were moved?

A. They were moved several times.

(Testimony of Lorn E. Anderson.)

Q. How many times?

A. Well, I can vouch for at least two moves that were made. Those two—I shouldn't say two moves—I should say two different orders for moving. This one—order for moving those pumps—they are not in this location at the present time, therefore, they must have been moved again.

Q. Now, did you mean by that order, for them to be moved later, or had they already been moved when you wrote that letter?

A. Well, they never were put in this position.

Q. They never were put in that place, were they?

A. No, they were moved to an entirely different position at a later date.

Q. Why did you tell Mr. Arnell that that particular move was an extra this morning?

A. If this move had been accomplished, it would have been an extra. [667]

Q. But it was not done?

A. Not putting it in this exact position. They moved it to another location, though.

Q. Do you know when they moved it to another location?

A. I don't know.

Q. Did you ever issue any other order to move it?

A. No, sir, I did not. I wasn't an employee of Mr. Carr for the full construction of the garage.

Q. You received pay for doing the whole job, though, did you not?

A. No, sir. I did not.

(Testimony of Lorn E. Anderson.)

Q. He paid you the full time you asked, though, didn't he?

A. He did.

Q. And that was \$2,725.00, wasn't it?

A. I believe there is another check on it, sir. I believe there was a previous payment on the first part. I don't know whether that one check was all or not.

Q. Can you tell us about how much the other check was?

A. I don't remember. It seems to me it was \$104.00, but I wouldn't vouch for that being correct.

Q. Did you ever go on this job during the daytime, when the work was going on?

A. Yes, sir.

Q. Did you ever see Mr. Carr there on the job?

A. I believe I did. [668]

Q. Did you ever talk to him there—speak to him?

A. Yes, sir.

Q. When was that?

A. I couldn't vouch for the date on that. I saw him during that period a number of times. I saw him at his other establishment, and I saw him at home, and I saw him on the grounds, but I couldn't vouch just when I had seen him at any one of the places, nor what was said at any specific meeting.

Q. What is the next item?

A. "Install a two-plunger hoist in lieu of the one-plunger hoist shown."

Q. Now, show me the one-plunger hoist on the

(Testimony of Lorn E. Anderson.)

plans—show me where it is. I don't know which one it is. Is it this one or—

A. There are two hoists shown.

Q. Show me where it says a one-plunger hoist.

A. It doesn't actually say a one-plunger hoist.

Q. It is not shown in the plans and specifications as a one-plunger hoist at all?

A. It is not shown as a one-plunger hoist in the specifications.

Q. Did you ever see that exhibit there that is marked Defendant's Exhibit No. J—did you ever see that?

A. I don't believe so. [669]

Q. Did you ever see one similar to it?

A. I have seen descriptive literature on this rotary hoist.

Q. Did you see Mr. Carr's hoist when it came and was unloaded?

A. Yes, I saw the hoist when it arrived on the job.

Q. And do you know when that hoist was ordered? A. No, sir, I don't.

Q. It was ordered before you drew the plans, wasn't it?

A. I don't know.

Q. It was a two-plunger hoist, exactly like the picture on the face, wasn't it?

Mr. Arnell: Mr. Bell, would you move back down here, please?

Mr. Bell: I want to show him this.

A. It was approximately like that.

(Testimony of Lorn E. Anderson.)

Mr. Bell: I am not in the habit of letting you order me around. If the Judge says so, I will.

Court: Counsel shouldn't ask any other counsel to do anything.

Mr. Arnell: I realize that, your Honor.

Court: Counsel should apply to the Court. It is bad enough to have one boss without having more than one.

Q. Now, why did you write that letter to Mr. Gothberg?

A. I wrote this letter actually at Mr. Gothberg's request.

Q. And where were you when he requested this? Where were you standing or where were you sitting when he requested that? [670]

A. I don't remember.

Q. Were you at work out on the base?

A. No, sir.

Q. Where did you write that letter?

A. At my home.

Q. And where is your home, or where was it at that time?

A. At this time it was 212 East 6th Avenue.

Q. In the town of Anchorage?

A. Yes, sir.

Q. That was when you wrote that letter?

A. Yes, sir.

Q. Then you knew, when you wrote that letter, that most of that work had already been put in, did you?

A. Yes, sir.

(Testimony of Lorn E. Anderson.)

Q. Can you tell the jury why the letter was written?

A. Mr. Gothberg had been given verbal instructions to do several items. He requested a letter, or a statement in writing, setting out exactly what he had been requested to do.

Q. Who had requested him to do those items?

A. Either myself or Mr. Smith.

Q. And did you know whether Mr. Smith had instructed him to do any one of those particular things or not?

A. I wouldn't say which ones I had instructed, or which ones Mr. Smith had instructed. [671]

Q. Did you give him that letter so that he might use it to sue Mr. Carr for extras?

Mr. Arnell: If your Honor please, I believe this is going far beyond the scope of cross examination.

Court: Overruled.

A. No.

Q. Now, you have testified about a change in wiring on the hoist. I believe you meant framing on the hoist, did you not?

A. If I got it wiring, maybe I am wrong.

Q. You testified to Mr. Arnell, as an extra, the change in this hoist. Now, how much money did you say this morning was due Mr. Gothberg for changing of that hoist from the two-plunger to the one-plunger, or reverse. How much did you say was due on that?

A. I didn't say what was due. I said that the

(Testimony of Lorn E. Anderson.)

price shown on the other exhibit was approximately correct.

Q. Do you know what that price was?

A. As I remember, it was about \$500.00.

Q. \$500.00 for changing the connection from a one to a two-plunger hoist?

A. No, that wasn't for changing the connection from one-plunger to two-plungers. It was for installing an extra line. Also, there's another hoist shown that Mr. Gothberg had to make provisions for. It was also necessary—the [672] necessary connections for that was actually two holes had to be dug out to put in concrete for it, to put in the walls around, and so on.

Q. You say you never did designate any specific one on the plans, a one-plunger or two plunger hoist?

A. May I see the specifications, sir?

Q. I will get them again for you.

A. It doesn't specifically state a one-plunger or two-plunger hoist in the specifications or plans.

Q. Then the only thing you know about it is that you did see the hoist?

A. No, sir. All I know about it is Mr. Gothberg gave Mr. Smith and myself some descriptive literature on the hoist, and it had an item marked on it.

Q. Now, you drew the plans showing two hoists exactly alike, didn't you? Would you look at those plans and see if you did?

A. That is correct.

Q. Did you make any showing whether it was to be a one-plunger or two-plunger hoist?

(Testimony of Lorn E. Anderson.)

A. No, we did not.

Q. Why did you tell the jury that this is an extra then?

A. Because the information furnished us—the descriptive literature given to the contractor indicated a one-plunger hoist. Therefore, if a two-plunger hoist was to be installed, [673] it would be an extra. That was an item furnished by the owner, and, in turn, the descriptive literature would be illustrative of what he was supposed to furnish.

Q. Why didn't you make some notation of it somehow or another, either in the drawings or in the specifications?

A. Because I am not infallible. I do make mistakes.

Q. Oh, I see. That is your only explanation of it then—you are not infallible and you do make mistakes?

A. Well, all humans are. And we also tell the owner on any job we design there should be a percentage set aside for extras, because we know some errors will occur, and there will have to be corrections as extras.

Q. Do you know in regard to the second hoist, whether there were any holes made for the actual installing of another hoist? A. Yes, sir.

Q. Did you see them yourself?

A. Yes, sir.

Q. When did you see them?

A. I wouldn't testify exactly to the time; however, there is a pad down there in the floor right

(Testimony of Lorn E. Anderson.)

now, that can be seen, that makes provisions for that hoist—a separate section of the floor so they can put in the other hoist without tearing out the floors.

Q. A place where they can tear out and put in the second hoist? [674]

A. Mr. Gothberg didn't have a second hoist. He couldn't put it in.

Q. Just who did you represent all through this deal—Mr. Gothberg, or did you represent Mr. Carr?

A. An engineer—

Q. Who did you represent?

A. All right. As an engineer myself, I am to represent the owner, but, in turn, on a job like this, an engineer is more or less of an arbitrator, which I performed between the owner and the contractor.

Q. You have heard other engineers testify in this case, haven't you? A. Yes, sir.

Q. And they testified that they would not accept a floor in the condition that this is in. Did you see this floor before you accepted it?

A. I did not accept that floor. I was not in Mr. Carr's employ at the time the floor was poured.

Q. Why do you state you were not in his employ?

A. Mr. Carr had hired me to do this job, and in turn he asked us to do the inspection work on it. During the period of inspection work on it, Mr. Carr called me on the phone one night and talked to me awhile and he was—I don't remember the whole situation. I do remember that we did talk some-

(Testimony of Lorn E. Anderson.)

thing about the plans for the finish work in the show room, [675] and Mr. Carr wasn't satisfied with the speed with which we were getting out the plans, and, in turn, I told him that I would no longer be considered in his employ.

Q. What date was that?

A. I wouldn't state the exact date. I would say that it was near the end of January. Probably, oh, around the 20th on to the 31st of January, sometime in that period.

Q. You already had your money in November, had you not? A. Money for what, now?

Q. Whatever money you drew. You had had the last pay check of \$2,725.00 in November, hadn't you?

A. We had a pay check for approximately that amount. Some \$2,700.00 in November, which was payment for the plans and specs which had been due us on the date that the contract was let.

Q. Then you charged Mr. Carr and Mrs. Carr, or whoever it was—Mr. Carr, I think you said—\$100.00 and some odd dollars, and then \$2,725.00, just for drawing those ten plans and drawing the specifications, is that true? A. Yes, sir.

Q. Or did that include the engineering fee for inspection of the work?

A. It did not include the engineering fee for inspection. I believe, if you will go back to the letter that was written to Mr. Carr, as a bill for that, it was stated in [676] that letter.

Q. Do you have a copy of it?

A. I don't have it here, no, sir.

(Testimony of Lorn E. Anderson.)

Q. Then you did not feel that after he called you that time, that you were any longer responsible to Mr. Carr in the carrying out of this contract and specifications? A. No, sir, I did not.

Q. Did you tell him you were quitting then?

A. Yes, sir.

Q. Was the argument over the fact that he was mad because you wouldn't get on the job and wouldn't go there and see about it?

A. No, sir, it wasn't.

Q. You say it was because the plans and specifications were late, is that right?

A. Mr. Carr wanted some additional design work done on the finish work in the show room, and he wasn't satisfied with the speed with which we were getting them out.

Q. And you had already given him all of these plans long before, hadn't you?

A. Yes, sir.

Q. In that conversation, was the floor mentioned?

A. Not that I remember.

Q. Do you know whether or not the floor was in at that time?

A. I believe not. [677]

Q. You think it wasn't in?

A. That's right.

Q. And that was in January or February?

A. Near the end of January, I believe.

Mr. Bell: That is all.

Court: Is there any further direct examination?

(Testimony of Lorn E. Anderson.)

Redirect Examination

Q. (By Mr. Arnell): Mr. Anderson, in regard to BCG 8, which is the plan of the marquee, would all of the items designated on that plat be regarded as structural steel? I mean all of the items—would they be determined structural steel, or something else?

A. No, there is a design here of a railing at the boiler room stairs which is certainly not structural steel.

Q. What would these beams be classified as?

A. Structural steel.

Q. Mr. Bell has asked you about the hoist. Do you have the original specifications there?

A. Yes, sir.

Q. I would like to direct your attention to Special Conditions, Page SC-2, Item E.

A. Yes.

Q. What does that item refer to? Would you read it?

A. Paragraph SC-2, sub-paragraph E: "One rotary car lift is [678] to be installed and provisions made for the future installation of a second."

Q. Now, is the hoist that is installed down there now, a rotary hoist?

A. I believe it is. I haven't checked the name on the hoist.

Q. I am referring to the trade name, Mr. Anderson. I am referring to the type of hoist.

A. Rotary hoist is a trade name.

Q. I realize that, but when you wrote these spe-

(Testimony of Lorn E. Anderson.)

cifications, did you mean to imply that that was the kind of hoist to be used there, or did the word "rotary" have another significance?

A. No, the rotary here is that trade name.

Q. Was there, at the time, a definite selection of a two-plunger hoist as distinguished from a one-plunger, at the time the contract and plans and specifications were approved by both parties?

A. At the time the contract was signed?

Q. Yes.

A. No, there wasn't a final selection that I know of. Mr. Carr had indicated a one-plunger hoist was the type to be furnished.

Q. Do you recall any discussions with Mr. Gothberg regarding the type of hoist that was to be installed, as distinguished from the trade name of a hoist? [679] A. No, I don't.

Q. Did Mr. Gothberg ever call you up by telephone and ask you for this item that you can recall?

A. Not that I recall.

Q. Now, to go back to the structural steel just a moment, Mr. Anderson, was there any representation to the contractor that all of the structural steel was on the site?

A. No, other than what's in the specifications.

Q. To your knowledge, were the plans which are in evidence here, the only plans that were made available to him?

A. The only thing you would classify as plans. There was some descriptive literature made available to him at a later date, such as descriptive

(Testimony of Lorn E. Anderson.)

literature on the washmobile—also, there's descriptive literature on the hoist.

Mr. Arnell: That's all.

Court: Is there any further cross examination?

Mr. Bell: That's all.

Miss Wise: Was that the plan that was submitted to the sub-contractor?

Mr. Anderson: I cannot answer that. The prime contractor gave the plans to the sub and I don't know what he gave to the sub.

Miss Wise: Were all those plans drawn up at the same time?

Mr. Anderson: Approximately the same time. I don't believe [680] they are all dated the same. They run from July 5th, 1950, to August 27, 1950. They were drawn over a period of time.

Court: That is all. Another witness may be called. No, the court will stand in recess and the jury will remember the admonitions of the Court as to duty, and the recess will be for 10 minutes.

Whereupon the court at 2:42 o'clock, p.m., recessed until 2:55 o'clock, p.m., at which time the following proceedings were had:

Court: The record, without objection, will show all members of the jury present.

Mr. Bell: I am working on some instructions that I want to offer, but we have been so doggone busy—excuse that slang—that I just haven't got them done, but I wonder if we get them done tonight, if it would be too late to submit them to you?

Court: You can submit them up to the time the case goes to the jury.

Mr. Bell: I am very anxious for you to give these. This one, I will tell you now, while Mr. Arnell is here, and I hope you will give it—maybe you have covered it—the defendants take the position that the plaintiff cannot recover on the contract since it has not been performed, and a suit filed on the contract is prematurely filed.

Court: I won't give that so far as I know now. I am [681] going to say that substantial performance is sufficient. Even if it has not been fully performed, the fact that there are some small items not performed, I think that would not preclude the plaintiffs. If you have some authority, I want it. We can't finish the case today, and I will look it up over the week end, so when we come back Monday afternoon—it will have to be—I have a hearing on annexation set for Monday morning, and I suppose there will be 50 people here, and I will have to suspend until Monday afternoon, if we don't finish tonight.

Mr. Arnell: So far as we are concerned, I think that our testimony will take only another 15 or 20 minutes.

Court: You have surrebuttal?

Mr. Bell: Very little. I think Mr. Carr.

Court: You can go ahead and argue this afternoon, but I will have to quit at 4:30 to take up some criminal matters. It is now three minutes of 3:00, so I don't see how you can cover your arguments, so I think, to do justice to your clients, I won't put

any limitation on it. You are experienced lawyers and know if you talk too long you defeat your purpose, but there is so much detail, it will be hard to argue the case.

Mr. Bell: I will work on that question tonight. I believe I am right, Judge, because I had that instruction given once. I offer that instruction, and I think I have a copy of it in my files. It was in an Oklahoma court.

Court: I am going to put the case to the jury and let the [682] jury render a verdict, and if the verdict should go against you, a motion to set for a new trial, or—we can do the same thing. If we should quit now, we have wasted all this time, provided you are right. I will put it to the jury anyway.

Mr. Arnell: I would be willing to have argument limited if the Court desires it. I don't like to limit it in a case of this kind, when there is so much detail, but I might limit it to an hour and a half. Would that be all right.

Mr. Bell: I think an hour and ten minutes to the side would give us good coverage. Do you, Ed? If you don't, I will consent. You be the judge.

Court: A witness may be called.

Mr. Arnell: Call Mr. Gothberg.

Mr. Bell: Before he takes the stand, Ed—I showed you this copy for you to inspect, and I believe I overlooked offering it.

Court: Is Mr. Anderson here?

Mr. Bell: He said he had seen it. Do you have any objection to its introduction?

Mr. Arnell: I do, your Honor, for the simple reason that it is not part of the contract, or the plans, or the specifications.

Mr. Bell: It is a structural steel drawing. Would your Honor like to look at it?

Court: I should sustain an objection to it at this time—— [683]

Mr. Bell: All right, your Honor. I will reoffer it.

Court: ——with the provision of its being re-offered if it seems it should be admitted.

Whereupon

VICTOR F. GOTHBERG

was called as a witness on his own behalf, and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, at what percentage of stage of completion was the building when Mr. Carr moved in?

A. About 99%—a little better.

Q. Then all that remained, virtually, was finish work on the outside and patch work, and that sort of thing, was it?

A. No, there was a little left in the office and the show room.

Q. When you say there was a little left, what was done, then, in the office and the show room after Mr. Carr moved in?

A. I don't recall exactly what was done, but I had two men there five days. They worked five days after he moved in and then it was finished.

(Testimony of Victor F. Gothberg.)

Court: What per cent of completion, did you say?

Mr. Gothberg: 99% or a little better.

Q. If you recall, Mr. Gothberg, state when the concrete floor was poured, in relation to the time Mr. Carr took possession, or asked for occupancy of the building?

A. I believe the floor was in just about three weeks before [684] he moved in.

Q. Had he asked you to expedite the job at this time, so that he could have occupancy?

A. He did.

Q. Was he down there at the time that concrete floor was being finished?

A. I don't remember if he was down there that day, but he came in the morning and still the concrete wasn't set.

Q. At that time did he make any objection to the condition of the concrete?

A. There was two places there was trowel spots, and he made objections to those two places.

Q. Where were those two places?

A. One was just opposite the big 12 by 12 door, and one was a little further north.

Q. What did you do as a result of this objection by Mr. Carr?

A. I went out and got the cement finisher that did the job, and got him before the concrete set, and he repaired those two spots.

Q. Who did that work?

A. His name is Mr. Nardici.

(Testimony of Victor F. Gothberg.)

Q. Was Mr. Carr there at the time these two places were fixed? A. He was there then, yes.

Q. Did you have any subsequent discussion with Mr. Carr, then, in relation to the floor? [685]

A. I had, and I asked him if it was O.K. after it was fixed, and his answer that he believed that's O.K. now.

Q. Was anything more done by you, at his request, with regard to the concrete floor?

A. No, there was nothing more done.

Q. Well then, he moved in, did he not?

A. Right.

Q. Mr. Gothberg, how long have you been in the contracting business here in Alaska?

A. Here in Alaska I've been since 1945.

Q. And were you in the contracting business prior to that time?

A. I started the contracting business in Chicago in 1925, as a general contractor.

Q. Are you familiar, Mr. Gothberg, with the customs and common usages that are recognized in the contract trade, where an owner occupies a building that is in process of construction or being finished? A. I certainly am.

Q. Will you explain those to the jury, please?

Mr. Bell: Your Honor, that is incompetent, irrelevant, and immaterial, and the witness is not shown competent to experience an opinion. That is purely an opinion asked for.

Court: I think the practices could not be binding upon the defendant unless it is shown that the de-

(Testimony of Victor F. Gothberg.)

fendant had knowledge [686] of the practice. To say that contractors have a practice is not sufficient, and the objection is sustained.

Q. Mr. Gothberg, did you have any discussion with Mr. Carr regarding your relative positions if he accepted the building?

A. I really didn't have at the time, but when he moved in, it is the same thing——

Mr. Bell: Object to him going further and attempting to say what the custom is.

A. That is not the custom. It's the law.

Mr. Bell: Object to him making a speech.

Court: If you had any conversation with him on the subject, you may repeat it. Otherwise——

A. Not that I recall.

Court: That is the answer then.

Q. Mr. Gothberg, I hand you Defendant's Exhibit J, and ask you whether or not you have seen that exhibit before, or a similar document?

A. I saw this at the time the hoist was delivered to the job. That is the first time I ever saw it.

Q. Prior to the time the hoist was delivered to the job, had you received any literature different from this?

A. There was some literature that showed a one-plunger hoist on it.

Q. Had you discussed the type of hoist with Mr. Carr, and also [687] his engineer, Mr. Anderson?

Mr. Bell: Object. This is repetition. This was gone into before by this witness.

(Testimony of Victor F. Gothberg.)

Court: Yes, I think this was all covered on direct and cross examination of the witness. My recollection is that nothing was omitted.

Mr. Arnell: I believe there are no further questions, your Honor.

Court: Any cross examination?

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, when did Mr. Carr move in the place?

A. I couldn't state exactly the date, but his own statement was the 15th of February.

Q. Well, you think that was about right, don't you? A. I believe so, yes.

Q. Now, I will hand you Defendant's Exhibit No. 4, and ask you to read that top line right there.

A. "Complete to date—90%." It is dated 2-10-51—building to date—90%.

Q. That was 90% of what amount?

A. Of \$31,000.00—a little over.

Q. And he paid you that statement that date, did he not, or a day or two later?

A. It was marked on there it was paid 2-25-51.

Q. That would be February 25th?

A. 25th.

Q. And he paid you according to the statement you served on him? A. Yes.

Q. And at that time you contended that the work was 90% done? A. Something like that.

Q. Now, did you ever figure what \$34,605.00 is 90% of—what figure?

(Testimony of Victor F. Gothberg.)

A. Of \$38,000.00—a little over.

Q. Well, then, at that time you contended that he owed you approximately 10% of the contract—10% of the balance due?

A. On the contract, yes.

Q. And you gave him this paper and he settled with you according to it?

A. No, the 10% has never been settled.

Q. I say he paid you this statement exactly as you billed him for \$10,381.50, and he gave you a check for \$10,381.50? A. Right.

Q. Which made 90% paid by three checks listed on your statement? A. Correct.

Q. Now, Mr. Gothberg, on that basement that you testified about—that Mr. Carr came in there and you say raised some objection to a couple of places in the concrete—that was [689] fresh concrete that day, wasn't it? A. Right.

Q. And those particular places were holes that were not even filled up, a couple or three inches deep, weren't they?

A. No, one hole, I believe, was half an inch deep—the biggest one.

Q. All they did was just dump some more concrete in it and level it off?

A. You know where concrete isn't set—you just have to rough it up a little and put concrete right on top.

Q. He called your attention to those two places as you were finishing up the pouring then?

(Testimony of Victor F. Gothberg.)

A. Right.

Q. And that is the only thing that was mentioned about the concrete floor at that time, wasn't it?

A. No, there was mention of the whole floor.

Q. You couldn't tell whether the floor was level—could you tell with the eye?

A. I could, because I had this water over, cleaning the floor. That's how I noticed there was two hollow places. If I didn't use water, I wouldn't notice it.

Q. Then you knew the condition of the floor that day? You had flooded it with water and knew the condition of it as of that date?

A. Right. [690]

Q. And it is still in that same condition today?

A. That I couldn't say.

Q. If it is out of level now, then it was out of level then?

A. Not necessarily, no—two years, you know, a floor can settle.

Q. Well, which is that—an eight inch or a six inch slab?

A. Six inch.

Q. And it isn't apt to settle very much?

A. Oh, yes.

Q. The one you built there is apt to settle?

A. Any slab.

Mr. Bell: That is all.

Court: That is all. Another witness may be called.

Mr. Arnell: We have no further evidence, your Honor.

Court: Is there any surrebuttal?

Mr. Bell: Yes, your Honor, we want to put Mr. Carr back on the stand.

Court: Very well.

Whereupon

BURTON E. CARR

resumed the stand on behalf of the defendants, and testified as follows:

Direct Examination

Q. (By Mr. Bell): Mr. Carr, you heard this man, Anderson, who was a witness here, testify that you gave him some literature on a hoist, that was a one-plunger hoist. Did you do that? [691]

A. Not on the one-plunger hoist—a two-plunger hoist.

Q. Is that the only literature you ever had or considered was a two-plunger hoist?

A. That is the latest equipment. They haven't had a one-plunger hoist for the last ten or fifteen years. I never seen one installed. A two-plunger hoist is the latest equipment.

Q. When did you order that two-plunger hoist?

A. It was ordered before he started in making the plans.

Q. Now, in regard to a plan for structural steel, that I had here a few moments ago. I will ask you to examine this plan and state whether or not that

(Testimony of Burton E. Carr.)

was shown to Mr. Anderson before the plans were ever drawn? A. Yes, this is the plan.

Q. Was that before you and Mr. Anderson and Mr. Smith on more than one occasion before the plans were drawn?

A. Oh, yes. He had a copy of this, the same plan—the identical same plan.

Q. Has there been any change in that at all?

A. No change at all.

Q. Do you know whether Mr. Gothberg saw that plan or not?

A. I couldn't say for sure if he saw it, because this steel company that designed this plan and Mr. Gothberg hired him to assemble it.

Q. The same company to assemble it that had made the plans? [692]

A. Yes, and that I bought the steel from.

Mr. Bell: We offer the plan in evidence.

Mr. Arnell: We wish to renew our objection on the grounds that it is incompetent. There is no showing Mr. Gothberg ever saw it, or that it was a part of any plans upon which he based his bid.

Court: The objection is sustained.

Mr. Bell: Exception, your Honor.

Court: The exception is noted. I think the ruling was erroneous. It was shown to Mr. Anderson, and he knew about it when he drew the plans and specifications, and it may conceivably have some value. The objection is overruled, and it may be admitted.

Clerk: Defendant's Exhibit T.

Q. Mr. Carr, I hand you Defendant's Exhibit T,

(Testimony of Burton E. Carr.)

which is the structural steel plan, and ask you to look at it and state to the jury whether or not, in that plan, there was ever any marquee shown in the drawing at all?

A. No, this plan didn't include a marquee for the front.

Q. Now, then, when Mr. Anderson was drawing the plans for your building, did he put a marquee in to fit to that steel drawing?

A. That's right—the first marquee—I had a marquee there that was according to this Nash plan, I believe. That's right over here—a pencil copy, because the City lost the original [693] of the plan, so I made a copy of it—a pencil copy, just as I remembered it.

Q. I will show you this pencil plan and ask you who drew that?

A. This one I drew myself. This is the plan that I showed Mr. Anderson and Mr. Smith, and this is the one that I give them an idea of the scope of the work, and he was to take the plan and make any changes to beautify the building, and give us more floor space and all, and I was going to have this marquee cut off square with a post in the center. He said it would look better if it was a rounded effect, so he decided on the rounding effect.

Q. Does your plan before you, that was penciled by you, have a post at the outer corner of the marquee?

(Testimony of Burton E. Carr.)

A. Yes, I have it marked for a post here.

Q. Then, was that particular plan, along with the steel plans, before Mr. Anderson before and during the time that the plans and specifications were being drawn?

Mr. Arnell: I would like, for the record, to interpose an objection on the grounds that this evidence is incompetent.

Court: The objection is sustained.

Q. Do you remember whether or not Mr. Anderson was shown that particular plan?

A. He was, because these are his pencil marks on here. It is his own writing right along here. He penciled it off, and this is where he got the idea of practically what I wanted. [694]

Q. Is there a marquee drawn on that plan with a pencil, that was drawn by him?

Mr. Arnell: If your Honor please, I wish to renew my objection again.

Court: The objection is sustained.

Mr. Bell: Your Honor, I seldom ever fuss about anything you do, because I think you are so right most of the time, but the reason I am offering this, your Honor, is to contradict the evidence of Mr. Anderson, who testified he had never seen that plan. Now, I am asking my witness what marks on it that he did.

Court: All right. The objection is overruled. You may answer. Is there anything to identify that the drawing was shown to Mr. Anderson?

Mr. Carr: Yes. He made his own marking on it.

(Testimony of Burton E. Carr.)

Mr. Arnell: I think, your Honor, my objection is still good. Mr. Bell can ask him a direct question, whether or not a certain fact existed, but this continuous reference to another plan that is not even in evidence, I think is wrong.

Court: Mr. Anderson was asked about some plan—whether his writing appeared upon it, or whether Mr. Smith's, and he said no, he had never seen it before. Assuming it is the same paper—

Mr. Bell: I will ask him.

Q. Mr. Carr, were you present in the courtroom when Mr. Anderson [695] was shown that particular plan that you have before you?

A. Yes, I was.

Q. Did you give it to me to take up to show it to him?

A. Yes, I did.

Q. Is it in the same condition now that it was when Mr. Anderson examined it?

A. Identical condition.

Court: The same paper?

Mr. Carr: The same paper.

Court: The objection is overruled.

Q. Was there a pencil mark drawn diagonally across the corner where the marquee was later placed? A. Yes.

Q. And who drew that line across the corner?

A. I drew this line across the corner myself.

Q. Who was present when you drew it across?

A. Mr. Anderson was present when I drew it across.

(Testimony of Burton E. Carr.)

Q. What was your purpose for drawing it across?

A. I told him I wanted a post on the outside of the building to hold up the marquee, and he said he could design it without a post, by putting some steel in, so I just drew the mark across there to show where the gasoline alley was.

Q. Now, Mr. Carr, how many times were the pumps moved?

A. One time.

Q. Do you have the permit that was issued for the moving of [696] those pumps?

A. Yes, I do.

Q. I will ask you if this is the permit that was issued by the City of Anchorage for the moving of the pumps? A. Yes, it is.

Mr. Bell: I offer it in evidence.

Mr. Arnell: We have no objection, your Honor.

Court: It may be admitted and marked appropriately as Defendant's Exhibit U, and may be read.

Mr. Bell then read Defendant's Exhibit U to the jury.

Q. Mr. Carr, you heard Mr. Gothberg say that you said that the floor was all right after he patched those two big holes, when it was being poured there. Did you tell him that?

A. I saw the two large holes there, and I went after him right away to have those patched, and he patched them.

Q. Could you tell anything about whether the floor was level or drained at that time?

(Testimony of Burton E. Carr.)

A. No, because we didn't walk on it. It was too green to walk on it.

Q. Did he put any water on it, in your presence, to see if it was level or not?

A. I never saw any water on it.

Q. Did you ever, at any time, either to Mr. Gothberg or Mr. Anderson, accept that job and say it was all right at any [697] time?

A. No, I didn't.

Q. Mr. Anderson testified that you fired him sometime. Did you do that?

A. No, I didn't.

Q. Was there a conversation had between you and Mr. Anderson about him supervising and inspecting the job?

A. Well, it was supervising, also, but there wasn't much said about that. The main thing was the fire wall. He didn't finish the plan for the construction, if it was to be block or wood, so Gothberg wanted that plan so he could go ahead and put in that wall. So I called Anderson up several times and he said they would have it ready and I told him I was very anxious to get that done, and he promised to have it ready. He said he hadn't started on it, and I told him if he didn't get it by the next day I was going to sue him. Then he slammed up the receiver, and that was all there was to it, but all the floor was in.

Q. Was there ever a conversation between you and him before you paid him the check of \$2,725.00, about what he would do, or he and his partner,

(Testimony of Burton E. Carr.)

Smith, would do, if you would pay him this money?

Mr. Arnell: If your Honor please, I would like to interpose an objection here. This has all been gone into on direct examination. [698]

Court: The objection is sustained. It's all been covered thoroughly on direct and cross examination in the main case.

Q. Did you ever see Mr. Anderson or Mr. Smith on the job during the working hours, when that building was being constructed?

Mr. Arnell: That is another repetition. The witness has already testified to that.

Court: The objection is sustained.

Mr. Bell: I would like to make an offer.

(Counsel and Reporter approached the bench.)

Mr. Bell: Mr. Anderson had testified in this case long after Mr. Carr had left the stand, that he had been to the building and inspected it many times, and that he was not to make inspections. He did not agree to make inspections regularly of the building, and the proposition I am asking him about took place in Mr. Carr's home the night that he paid him the \$2,725.00, which was sometime in November of 1950, and at that time, if you will permit this witness to testify, he will testify that Mr. Anderson told him that he or Mr. Smith would be on the works every day and he would have a paid engineer on the job every day during the construction of the work, and I offer to prove that by this witness, to contradict the statement of Mr. Anderson, who testified since Mr. Carr was on the stand.

(Testimony of Burton E. Carr.)

Mr. Arnell: If your Honor please, the basis of my objection is that it is erroneous. I think the evidence which Mr. Carr has already testified to and brought out, is to the effect that Mr. Anderson did not have any authority whatsoever to represent him on this job because he had been paid in full.

Court: The objection is sustained on one ground. It is repetition in any event, and it should have been brought out before Mr. Anderson testified.

Mr. Bell: I am offering this to show that I had no idea. I couldn't anticipate that Mr. Anderson would testify that he did supervise this job, or I had no way of suspecting even that he would testify to such a thing. Therefore, to do it now, after I did lay the foundation by asking Mr. Anderson if he didn't agree to this while he was on the stand—and he said he did not—therefore, I thought it was proper to have this witness testify that Mr. Anderson did agree to this at the time the \$2,725.00 was paid.

Court: As I recall, Mr. Carr was examined and cross examined thoroughly upon this point, as to what he said to Mr. Anderson and what Anderson said to him, and what Anderson's authority was, and I took it that Mr. Anderson's testimony was simply an answer to what Mr. Carr had said. To permit Mr. Carr to go into this, Mr. Arnell can call Mr. Anderson back and it could go on all night—I just don't see. The objection is sustained. [700]

Mr. Bell: Exception.

(Testimony of Burton E. Carr.)

(Counsel and Reporter stepped down from bench.)

Q. Has there been any work done on this building in the way of finishing it since the pumps were moved by Mr. Gothberg?

A. Only except as I testified before. He had a carpenter come in there and tried to make the doors work.

Q. Approximately what date was that?

A. That was several times. He had carpenters in there to try to get the doors to open and close so we could get in and out of the offices.

Q. Was that this year or last year?

A. That was this spring.

Q. This spring?

A. Yes.

Mr. Bell: I think that's all.

Court: Counsel for plaintiff may examine.

Cross Examination

Q. (By Mr. Arnell): Did I understand you to testify to the effect, Mr. Carr, that Exhibit T, which you have before you there, which is the layout of the steel framework of the building, was shown to Mr. Gothberg at any time prior to the time this contract was signed?

A. I naturally assume anybody takes a contract for that much money—that was to install the steel and put it in place, [701] but Mr. Gothberg would have to read the specifications to make a bid on it. He wouldn't just make a bid.

(Testimony of Burton E. Carr.)

Q. Where has that plan been ever since you showed it to Mr. Anderson?

A. This one has been in my possession, and he had one, also. The plan that he has—Mr. Anderson and Mr. Smith—we went over to Marion Smith, that is the man that put in the first foundation, and he give us the plan identical like this. Then he give us one plan of the original foundation that this other Mr. Smith, the architect, drew; then the City lost the original plan and I drew this from memory from the original plans that the City lost.

Q. Now, will you answer my question and state whether or not you know that Mr. Gothberg saw those plans?

A. I couldn't say if he had seen them or not. The only thing I know, he would have to see them to bid on the building.

Q. If they were in your possession, how could he see them?

A. I got this set of plans afterwards. I got this set of plans from the Steel Fabrication down there on Railroad Avenue. This is an extra set, identical—the same plan.

Q. Well, if Mr. Gothberg was required to furnish any steel, why did not that plan go into the basic plans and specifications that were eventually approved by both of you?

A. This is the only plan I have and I borrowed this. This belongs to this structural steel company. [702]

Q. When did you borrow it?

(Testimony of Burton E. Carr.)

A. I borrowed it several months ago.

Q. At the time the contract was signed, or just recently?

A. I borrowed it several months ago—I believe it was several months ago, I couldn't say. It was the time that the structural steel was being assembled.

Mr. Arnell: Your Honor, at this time I would move that the exhibit be stricken from the record. There has been no identification or showing, at least so far as Mr. Gothberg is concerned, that that document was ever brought to his attention or was known to exist.

Court: I think there is sufficient showing to admit it. This is Defendant's Exhibit T, ladies and gentlemen, and it is a blueprint which appears to show the plans, or drawings, of the structural steel of the building, without the marquee. It has been admitted in evidence. At first I thought it should not go in, then it seemed that it might conceivably have some bearing upon it, because Mr. Anderson said he had this when he made the plans and specifications, but you should remember specifically that there is no proof that Mr. Gothberg, the plaintiff, ever saw this plan at all—no proof that he ever saw it. Mr. Carr thinks he must have seen it before he made the bid, which is a matter of argument to you. Mr. Gothberg said he didn't see it and there is no proof he did, but it was shown to Anderson. Now, if you think it is of any consequence, by reason of the fact that [703] it was shown to Mr. Anderson,

(Testimony of Burton E. Carr.)

it is your job to decide what bearing it has on the case. The motion is denied.

Mr. Arnell: Since this is an entirely new matter, your Honor, may I call Mr. Gothberg when this witness is released?

Court: He testified he didn't, did he not?

Mr. Arnell: He hadn't had an opportunity. I don't think I asked him that question.

Court: All right. He may testify on that one point. I withdraw my statement that Mr. Gothberg testified he had not seen it.

Mr. Arnell: I have no further questions, Mr. Carr.

Mr. Bell: That's all.

Court: This is a bit out of order, but Mr. Gothberg may be called on rebuttal to testify on this one point, and no other.

Whereupon Mr. Carr left the witness stand and

VICTOR F. GOTHBERG

was called as a witness in his own behalf, and testified as follows:

Direct Examination

Q. (By Mr. Arnell): Mr. Gothberg, you have been handed Defendant's Exhibit T, which is the plan, or sketch, of the proposed steel framework of the building. I now ask you whether or not you have ever seen this plan before?

A. I never seen that before that was shown to Mr. Anderson this morning. [704]

(Testimony of Victor F. Gothberg.)

Q. Did Mr. Anderson ever exhibit any such plans to you at any time? A. No.

Q. Are the plans that are in evidence here the only ones you ever saw——

A. This is the first time I ever seen this today.

Q. Will you explain to the jury, Mr. Gothberg, upon what basis you bid this contract so far as the steel is concerned?

Court: I don't think we ought to go into that. It is too late. He can testify he never saw this paper.

Mr. Arnell: That is all.

Cross Examination

Q. (By Mr. Bell): Mr. Gothberg, you did agree and contract in the contract and specifications to place that steel, didn't you?

A. I did, yes.

Q. And you did place the steel, didn't you?

A. Yes, the steel company placed it for me.

Q. Now, how did you know what you were bidding on, and how much steel you were to handle if you didn't have a similar plan to that one?

A. I called the steel company. I didn't know how many pounds there was so I called them up and asked them. I know the price is 5c a pound for setting steel, and I asked them if they had seen the plan. I said I don't know how much there [705] is—I haven't seen the plans, and he said I will figure it for you, and he give me a figure of a flat \$2,000.00.

Q. Did you see another plan that looked like

(Testimony of Victor F. Gothberg.)

that one—not that paper, but one the steel company had on the job when they were putting it up?

A. No, I never seen the plan.

Q. Were you ever there when they were setting the steel? A. No, I wasn't.

Q. When you talked to Mr. Anderson about the steel, did he say anything to you about who had made the steel? A. No, he didn't.

Q. How come you to later know to call some steel company—that they were the ones that made it?

A. There is only one that does that construction in Anchorage. They are the only one I could call to do the erection of steel.

Q. You found out, though, that the steel was fabricated in Seattle, didn't you? A. Yes.

Q. It wasn't fabricated here at all, was it?

A. No.

Q. And the only way you could have figured on the steel and the handling of it was to have seen some plan?

A. No. He told me how much to erect it, and he told me \$2,000.00, and I says the job is yours. [706]

Q. Who did you call?

A. That steel company that's down on Third Avenue. I believe they call it Pacific Steel.

Q. Pacific Steel down on Third Avenue?

A. Yes, I believe so.

Q. That was in Anchorage?

A. That was in Anchorage.

Q. Did you show them a map or plat, or anything, of what had to be done? A. No.

(Testimony of Victor F. Gothberg.)

Q. They just guessed at it?

A. They told me over the telephone that the steel was in the design of the plan and they could figure it.

Q. Do you know who gave them that plan?

A. I don't know who give it to them, no.

Mr. Bell: That's all.

Court: That completes the testimony—

Mr. Bell: Your Honor, at the close of all the testimony I would like to reoffer in evidence the figures and specifications, and the report of the engineer, Victor C. Rivers. I think now that since everybody has testified, that this should be before the jury.

Court: Is there objection?

Mr. Arnell: We have the same objection to it, your Honor, that we had before. [707]

Court: The objection is sustained. If Counsel desires, in order to get it in the record, perhaps it better be marked for identification—Plaintiff's Exhibit V.

Mr. Bell: Your Honor, if you would like, may I suggest that if Mr. Arnell and I are both willing, at this time that the bailiff take the jury to the scene and see this building with none of us there. Just let them go with the bailiff.

Court: That is agreeable to me. I think it may conceivably be helpful. Who is going to pay for the taxicabs? That is the next thing.

Mr. Bell: Your Honor, I thought we might be able to get a bus, if we could.

Court: That would be better. Get a bus, and then when you have inspected the building, I think, to keep the proceedings regular, you better come back here and the case will be continued until Monday afternoon. Two ladies today, Mrs. Hoffman and Mrs. Lohmes, inquired whether they might be excused on Tuesday. It seems they have some duties in connection with the City election that is to take place on Tuesday. The matter here involves considerable consequence to a lot of people, and it is not easy to postpone it. Therefore, when we adjourn with this trial today, we will adjourn until Monday afternoon at 2:00 o'clock, and I expect it will take a good share of the afternoon for Counsel to argue the case and for the Court to instruct the jury, so the case may not go to the jury until [708] fairly late on Monday afternoon. And, speculating again, that the jury should not be able to agree promptly, why, Mrs. Hoffman and Mrs. Lohmes, I think, may be still debating on the case on Tuesday, so I think you better get yourselves excused from service on the Election Board on Tuesday, if that might be done; otherwise, you may find the Election Board may be without your services. I don't know where we can get a bus, do you, Mr. Bell?

Bailiff: I can probably call the bus station. I am willing to take my car. I can take five or six people.

Mr. Bell: Two or three taxis can take them.

Mr. Young: I have a car and I could take about six, if they want to sit in it.

Court: We better not crowd too much. We better

get at least one taxi, and I shall advance whatever money is necessary to pay the fare. If you pay it, let me know, and we will charge it to the party. Ladies and gentlemen of the jury, you are about to inspect the premises. You should not talk with anybody around there, because that would be the equivalent of getting testimony out of the presence of the Court and Counsel. Just go in and look it over and don't say anything more than "How do you do" or "Good afternoon" to anybody there, and don't ask any questions and don't permit anybody to talk to you about it. Then, when you are all through, come back here and report in, and then you will be excused until Monday afternoon at [709] 2:00 o'clock. The Court now stands in recess until 4:30 this afternoon.

Whereupon the trial of the above entitled cause was continued from 3:50 o'clock, p.m., until 4:57 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Ladies and gentlemen of the jury, the trial of this case will be continued until next Monday afternoon at 2:00 o'clock. Please report next Monday afternoon at 2:00 o'clock, and the Court stands adjourned until 10:00 o'clock tomorrow morning.

Whereupon at 4:58 o'clock, p.m., October 2, 1952, the trial of the above entitled cause was continued until 2:00 o'clock, p.m., October 6, 1952.

Be It Further Remembered, That at 2:00 o'clock, p.m., October 6, 1952, the trial by jury of the above

entitled cause was continued; the members of the jury panel being present and each person answering to his or her name, the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding.

And Thereupon, the following proceeding were had:

Mr. Bell: Your Honor, I have three motions I would like to make as preliminary motions, in addition to one I made to dismiss as to Mrs. Carr.

Court: Yes, the motion to dismiss as to Mrs. Carr will be [710] granted at the close of the trial and before arguments.

Mr. Bell: You covered that in the instructions. I have three motions I would like to make for Burton E. Carr.

Court: Do you wish to make them now? If you wish, I intend to let Mr. Carr testify with respect to the testimony by Mr. Anderson. Ladies and gentlemen of the jury, I thought when we ended last Thursday that that was the end of the testimony. Mr. Carr was on the stand in surrebuttal, and he was asked certain questions which the Court excluded, and then Counsel for Defendant Mr. Carr, made a certain offer of proof—some matters with respect to the testimony given by Mr. Anderson, the engineer. I think a part of Mr. Anderson's testimony should have gone in with the plaintiff's case in chief, before the plaintiff rested, and other facts were undoubtedly surrebuttal. It is not so easy to sort it all out, but I believe now, upon reflection, that justice would best be done by per-

mitting Mr. Carr to resume the stand and testify with respect to certain claims asserted by Mr. Anderson, concerning which Mr. Carr did not testify when he was on the stand before. Therefore, the order excluding the testimony of Mr. Carr is set aside and the defendant may resume the stand and Counsel may proceed with examination within the limited scope herein indicated. The defendant may resume the stand.

Whereupon Mr. Carr resumed the stand in his own behalf and testified as follows: [711]

BURTON E. CARR

Redirect Examination

Q. (By Mr. Bell): You are the Burton E. Carr, who is the defendant in the case, are you not?

A. Yes.

Q. Mr. Carr, did you hear Mr. Anderson testify just during the last day of the trial of this case?

A. Yes.

Q. I will ask you if, when you paid Mr. Anderson and his partner, Mr. Smith, this \$2,725.00, what did Mr. Anderson say to you about the supervision of the job?

A. Well, Mr. Anderson and Mr. Smith were there, and when I presented this check he said, "Now, on the inspecting of the building, we will inspect the building. Either I or Mr. Anderson will be there 8 hours a day, or else, if we are not able to be on the job, we will have a paid man on the job at all times."

(Testimony of Burton E. Carr.)

Court: Do you remember whether you testified to that when you were on the stand?

Mr. Carr: I don't think there was any questions asked. Now, one particular thing, I believe I testified something similar about the same thing, and then we give him this check, and then right away Mr. Smith, he took a trip to the states, on his vacation, and I never did see him again to this day. I never seen him. [712]

Q. Did you ever see Mr. Anderson on the job during the construction of this building?

A. Only one time is all.

Q. And when was that?

A. That was—we had some controversy about the foundation, where they hooked the foundation on to the old foundation—it wasn't satisfactory and I told him I believed that would crack off, and he said no, it wouldn't. We were supposed to meet him there the following Sunday, and I dug down and it was all frozen solid, at least four feet of freeze. I dug down about two and one-half feet—I am sure it wasn't three feet, and then I put the shovel underneath and there was just nothing but gravel.

Court: My recollection, Counselor, is that all this was gone over.

Mr. Bell: Yes, I didn't ask about that.

Q. I asked you what was the occasion of your having seen him on the job the one time you have referred to?

(Testimony of Burton E. Carr.)

A. That was on account of the foundation—that is the only one.

Q. And did you ever ask him not to come or release him from coming?

A. Oh, no, I never did. I had a lot of telephone conversations trying to get him down there, and he said he would take it up with Gothberg, and I could never get him down on the job, but he claimed he came up—not in my presence, or it was [713] dark, and I didn't see him. How he could do any inspection then—he couldn't see what was covered up.

Mr. Bell: That's all.

Mr. Kurtz: Did I understand you to say that Mr. Anderson was present when the foundation was being built?

Mr. Carr: Yes.

Mr. Kurtz: Did you also testify that at that time you dug down and discovered that there was about three or four feet of freeze?

Mr. Carr: Yes, there was that much freeze.

Mr. Kurtz: When was the foundation completed?

Mr. Carr: The foundation was in at that time, but I didn't like the installation of the foundation.

Mr. Kurtz: When was the foundation actually completed?

Mr. Carr: Oh, let's see, I'll tell you. The reason why I dug down there——

Court: Just answer the question first.

Mr. Carr: That was in—let's see—that was pretty near early spring or early summer when I—you see,

(Testimony of Burton E. Carr.)

the foundation cracked, and that is the reason I dug down.

Mr. Kurtz: I understand he was there inspecting it when the foundation was being constructed. My question is, when was the foundation completed?

Mr. Carr: Well, the foundation was in, I believe, around August, I believe, but after this crack, I didn't know this [714] foundation was going to crack. After the weight on the building on top, it cracked—that was the reason I dug down—I wanted him to look at it.

Mr. Kurtz: Did you testify that at the time it was being constructed, you dug down—I believe you stated you objected to the way they were constructing the foundation?

Mr. Carr: Yes, I objected to the way they was constructing it, because I didn't think it would hold up, and after the weight of the buiding got down there, and it cracked in the winter time—well, then I decided to dig down then, and Mr. Anderson was supposed to be there and he wasn't. I called him up and I told him I dug down, so he was supposed to be there on the following Sunday, so then I recovered it up again on the top until he would come down himself, but he never did come because it was never disturbed at all. He claimed he inspected it, but I know he didn't—he wasn't down there.

Court: That appears to be all, Mr. Carr.

Whereupon Mr. Carr left the witness stand.

Court: That concludes the testimony as I understand. Counsel for plaintiff wishes to make some motions. Do you wish to make them in the presence of the jury?

Mr. Bell: I am presently willing to come up to the bench so as not to disturb the jury.

(Counsel and Reporter approached the bench.)

Mr. Bell: Comes now the defendant Burton E. Carr, and [715] moves the Court to require the Plaintiff to elect whether he will proceed further on the right to recovery on the written contract, or whether he will proceed on the right of recovery on quantum meruit.

Court: The motion is denied unless you want to argue it.

Mr. Bell: No, I am not going to argue it, your Honor, because I have already argued it to you. Now, I want to move to dismiss. Comes now the defendant Burton E. Carr, and moves the Court to dismiss the Plaintiff's causes of action each separately. This motion being directed to each of them, 1, 2, 3, 4, and 5, and moves directly against each of the causes of action for the reason that there is no evidence brought before the Court justifying any recovery on any theory of either one of the 5 motions, especially is this true due to the fact that the question of substantial compliance is a question of law for the Court and not a question of fact for the jury, and there is an admission on the part of the Plaintiff that he did not comply with several sections of the specifications, and there is testimony showing 34 failures to comply with the

terms of the contract and specifications and plans, and a great many of the 34 have been testified to and have never been answered, and the Plaintiff has never claimed to have complied with them, and therefore it comes under the theory that it is not a substantial compliance and, of course, the Plaintiff could not, under any sense, recover on the strict compliance rule [716] and then, if he recovers at all, it will have to be on the substantial compliance rule, and the substantial compliance rule being that he must prove that he has substantially complied with all of the terms of the contract and that he did not carelessly or intentionally or purposely fail to comply with any specification, because if he did that, then we are entitled to an instructed verdict for the defendant on the plaintiff's causes of action, since they are all based upon the same pair of contracts, and there being no dispute that he has, and the plaintiff stated that Mr. Carr tried to get him to do some things about complying with the terms of the contract, and that he told Mr. Carr if he would pay him \$10,000.00 on the contract, he would go ahead and do it, but he would not do it unless Mr. Carr paid him the \$10,000.00, and, further, it is clear that he intentionally refused to comply with the terms of the contract, and therefore substantial compliance does not apply.

Court: The motion is denied as to each of the causes of action.

Mr. Arnell: In order that the record may be complete, I wish to present first, a motion for a

directed verdict as to the plaintiff's first cause of action, and a motion for a directed verdict as to the plaintiff's second cause of action, and also a motion for a directed verdict as to the plaintiff's fifth cause of action. I believe it is an amount that involves the \$3,925.00, approximately, upon the grounds that the defendant [717] has not presented a valid defense to any of these causes of action and such evidence that the defendant has presented does not support the defenses *pleaded* in his answer and cross complaint. There is no evidence before the Court or the jury on behalf of the defendant which refutes or denies that the plaintiff is not entitled to recover.

Court: You mean as to the first, second, and fifth causes of action?

Mr. Arnell: Yes. Except by way of the fact that any recovery that the defendant might have or make will be based entirely upon such recovery, if any, as he makes upon the cross complaint, and I would like, also, to move that the defendant's cross complaint be dismissed on the grounds that it is not supported by the evidence.

Court: That motion is denied unless you wish to argue it further.

Mr. Arnell: No.

Court: All of the instructions submitted, both on behalf of the plaintiff and defendant will be refused except as covered by instructions given. The Court may give some additional instructions to take care of some features, but at this time, under the rule which requires the Court to announce

the disposition of the proposed instructions, the decision must be that all will be refused except as covered by instructions given. [718]

Mr. Arnell: May we approach the bench? I believe there has been a typographical error as to the amount in one of the instructions.

Court: I figured the amounts and had Mrs. Knutson figure. What is it?

Mr. Arnell: It relates to the 4th cause of action, and the particular instruction I have reference to is No. 4, line 8. I think the amount there should be \$5,351.74 instead of 43.

Court: That is my recollection, too. Let me see. I guess it is the same way in the amended complaint.

Mr. Arnell: Our stenographer made a mistake in the second one, and I told her to correct it, and I think she did before it was filed.

Court: We will see. Yes, \$5,351—that will be changed in the instructions. Counsel may amend their copies of instructions No. 4, in line 8, by inserting the figure “5” instead of the figure “4” in line 8. Change it from 4 to 5. By some mischance 4 was substituted for 5 in the instructions. Counsel for plaintiff may make opening argument to the jury. If Counsel desire, if both agree, I will impose a limit on each side. If not, there will be no limit.

Mr. Arnell: I would just as soon have a limit, your Honor.

Court: Well, if you and Mr. Bell can agree on it, it is [719] all right. If you cannot—I do hope

you can finish this afternoon. If you cannot, why then we will have to go on tomorrow.

Mr. Bell: I will agree on an hour a side, your Honor.

Mr. Arnell: That is agreeable to me. I hope to take a lot less time than that.

Court: It will be an hour per side, and counsel may divide up the time. Counsel for plaintiff, of course, will take it all.

Opening argument was then made to the jury by Mr. Arnell.

Court: The jury will remember the instructions of the Court as to duty and the Court will stand in recess for 10 minutes.

Whereupon at 2:45 o'clock, p.m., the Court recessed until 2:56 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present. Counsel for defendant may argue the case to the jury.

Argument was then made to the jury by Mr. Sanders and Mr. Bell.

Court: The jury will remember the instructions of the Court as to duty, and the Court will stand in recess for 10 minutes.

Whereupon the Court at 3:58 o'clock, p.m., recessed until [720] 4:10 o'clock, p.m., at which time the following proceedings were had:

Court: Without objection, the record will show all members of the jury present.

Closing argument was then made to the jury by Mr. Arnell.

Court: In Instruction No. 1, page 3, line 15, after the figure "\$20,000.00," I have inserted another sentence which was inadvertently omitted: "The plaintiff denies the affirmative averment of defendant's cross complaint and amended answer." I stated that the jury would be so instructed.

Court: Ladies and gentlemen of the jury, it now becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon and disposition of this case. When you were accepted as jurors you obligated yourselves by oath to try well and truly the matters at issue between the plaintiff and the defendant in this case, and a true verdict render according to the law and the evidence as given you on the trial. That oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the [721] Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

1.

This is an action brought by the plaintiff, Victor Gothberg, an individual doing business as the Gothberg Construction Company, against the defendant, Burton E. Carr, his wife, Marie Carr, Jack Akers and Sherman Johnstone. By order of the Court heretofore made, the action has been dismissed as to the defendants Marie Carr, Jack Akers and Sherman Johnstone, and as a consequence thereof, Burton E. Carr is now the sole defendant in the action.

This action is based upon several contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of \$51,779.16, upon which the defendant has paid the sum of \$34,605.00, leaving a balance due, owing and unpaid from the defendant to the plaintiff in the amount of \$17,174.16.

The plaintiff asserts that the first contract between plaintiff and defendant related to the construction of a foundation for the building afterwards erected thereon; that [722] the foundation had been built by others but by reason of some City ordinance it was required that the foundation of the building to be constructed be moved further to the rear of the lot and that as a consequence, it was necessary to move the front part of the foundation to the rear, a distance of about 12 feet, and to build a new rear foundation approximately 12 feet further toward the back end of the lot than

was the foundation originally built; that although a written contract was entered into between the parties to do foundation work for the compensation of \$2,542.00, such changes were made by oral agreement as to result in a final price of \$4,051.84, which is claimed by the plaintiff for that part of the work. This last figure is in error by \$50.00, and should be \$4,001.84.

After beginning the trial of this action the plaintiff filed herein an amended complaint embracing five separate causes of action covering the different features of the contracts and agreements between the plaintiff and defendant. In the first two causes of action contained in the amended complaint, the plaintiff refers to the contract of May 25, 1950, for construction work on the foundation at the agreed value of \$2,542.00 and asserts, in his second cause of action, that at the instance and requests of defendant, the plaintiff performed additional work thereon of the value of \$1,459.84, thus making the total of \$4,001.84 hereinbefore referred to.

It further appears from the plaintiff's amended complaint [723] and from the evidence that a written contract was made between plaintiff and defendant for the construction of a building on the foundation above mentioned at an agreed cost of \$38,450.00 with provision for possible additional work; that after the signing of the contract, which embraced by reference plans and specifications, the plaintiff performed additional work on the building partly in the nature of finishing work and partly by reason of changes agreed upon by the parties,

so that eventually, the total charge of the plaintiff to defendant for all of such work amounted to \$47,-722.32. This sum added to the plaintiff's charge against the defendant for the foundation work brings the total claimed by plaintiff, as shown above, to \$51,779.61, on which has been admittedly paid the sum of \$34,605.00, leaving a balance due and owing from defendant to plaintiff, as asserted by plaintiff, in the amount of \$17,174.16.

The defendant, in his answer and cross complaint and in his answer to the amended complaint, which by reference also embodies the cross complaint, asserts that the only contract between plaintiff and defendant with respect to the foundation was a written contract calling for payment of \$2,542.00, that all this has been paid and hence there is nothing due from the defendant to the plaintiff upon the plaintiff's claim for compensation having to do with the foundation of the building. With respect to this subject, you will recall that the defendant has stated that a part of the work done in the basement boiler [724] room is to be considered as extra work and not included in the construction price of the building of \$38,450.00 provided in the contract, but the defendant further stated that such extra work was not worth more than \$250.00.

The defendant in his answer and cross complaint and his answer to the plaintiff's amended complaint, alleges that he has paid to the plaintiff on the contract for the construction of the building several sums amounting in all to \$34,672.57; and that the defendant further paid out various sums to do work

on the building and furnish material therefor which was required to be done by the plaintiff under the contract. The defendant further avers in the cross complaint and in his testimony in support thereof, that the plaintiff failed and refused to perform many items of work and labor and failed to supply certain materials which, the defendant asserts, plaintiff was bound to perform, supply and furnish under the terms of the contracts; that the plaintiff failed to do much of the work on the building in a good and workmanlike manner; and that as a result of all of these violations of contract on the part of plaintiff, the defendant has been damaged in the sum of \$20,000.00.

The plaintiff denies the affirmative averments of defendant's cross complaint and amended answer.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in this action [725] consisting of the plaintiff's amended complaint and the answer and cross complaint filed by and on behalf of the defendant and his answer to the amended complaint, so that you may, if you wish, read these pleadings and thus perhaps gain a clearer concept of the various claims and contentions of the parties, one against the other.

However, you should remember that pleadings are in no sense evidence. You should not consider any pleading as evidence that the pleader is entitled to what he claims. The pleadings merely serve the purpose of setting forth the claims and contentions of the parties and if any assertion or fea-

ture of any pleading is not supported by sufficient evidence, it should be disregarded entirely. Your decision in this case must be based as to the facts upon the testimony given in open court and the other evidence presented to you in open court, and also, as to the law only, upon instructions of the Court. You have been permitted during the trial to view the premises in dispute, and accordingly you may also consider the knowledge you have gained by such inspection, but in considering that knowledge, you must remember that a considerable period of time has elapsed, approximately 1½ years, since the building went into the possession of the defendant, and hence, allowance must be made for natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and [726] workmanlike fashion.

2.

In a civil case, such as this is, the burden of proof rests upon the party holding the affirmative with respect to any issue, and under that rule he is required to prove such issue by a preponderance of the evidence. By a preponderance of the evidence is meant the greater weight of the credible evidence, that evidence which in your judgment is the better evidence and which has the greater weight and value and the greater convincing power. This does not necessarily depend on the number of witnesses testifying with respect to any question of fact, but it means simply the greater weight or the

greater value and convincing power and which is the most worthy of belief; and so, after having heard and considered all the evidence in the case on any issue, you are unable to say upon which side of that issue the evidence weighs the more heavily, or if the evidence is evenly balanced on any particular issue in the case, then the party upon whom the burden rests to establish such issue must be deemed to have failed to prove it.

Under the rule above stated, the burden is upon the plaintiff to prove the material averments of his amended complaint by a preponderance of the evidence. Similarly, the burden is upon the defendant to prove the material averments of his cross complaint by a preponderance of the evidence. [727]

3.

In considering the contract between the parties for the construction of the building, you are charged that the plans and specifications admitted in evidence are a part of that contract and each of the parties is bound to a faithful fulfillment of the provisions thereof.

There is nothing in the law to forbid the parties to such a contract to modify the terms thereof including the plans and specifications by oral agreement and if you should find from the evidence that any term or provision or item of the contract, including the plans and specifications, was, after the signing of the contract, changed or modified by oral agreement of the parties, then you must give

effect to such changes or modifications in the verdict which you will render in this case.

By stating that each of the parties is bound to a faithful fulfillment of the provisions of the contract, it is meant that there must be a substantial, rather than literal, compliance with the provisions of such contract. "Substantial compliance," with reference to contracts, means, that although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received essentially the benefit he expected. [728]

3-A

With further reference to substantial performance of the contracts, there is a substantial performance where the variance from the specifications of the contracts is relatively trivial and unimportant and is one by which the building and structure as a whole is not impaired and where the building and structure is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price. On the other hand, to constitute substantial performance, a general adherence to the plans prescribed is not sufficient and the contract is not substantially performed if the builder wilfully, carelessly or in bad faith fails in his duty of per-

formance or leaves his work incomplete in any substantial and material respect or makes deviations and omissions without the consent of the owner, that affect a large saving to himself and a consequent damage to the owner, or which are so substantial as not to be capable of remedy and an allowance out of the contract price will not give the owner essentially what he contracted for.

3-B

If you find under the law as stated in these instructions that the plaintiff failed to perform substantially any of the several contracts, whether written or oral, here sued upon by [729] plaintiff in his five separate causes of action as stated in his amended complaint, and did not substantially perform and carry out such contract, the plaintiff is not entitled to recover anything whatever on such contract which has not been substantially performed.

4.

In the plaintiff's second, fourth and fifth causes of action, he claims compensation for work done and material furnished not covered by the written contracts between the parties which are dated May 25, 1950, and September 19, 1950, the earlier one concerning the foundation of the building and the latter the construction of the main building itself. The amount claimed in the second cause of action is \$1,459.84 and in the fourth cause of action \$5,351.74 and in the fifth cause of action \$3,925.00. You should consider the evidence in support of and

against the averments contained in these causes of action just the same as you consider the evidence upon the first and third causes of action. If you find that the plaintiff has proved by a preponderance of the evidence the material averments of his amended complaint with respect to any or all of these causes of action, you should give credit to the plaintiff in your verdict accordingly. The claims of the plaintiff based upon alleged oral contracts are to be considered just as carefully as those based upon the written contracts submitted in evidence. If you find [730] that the plaintiff has failed to support any of his claims against the defendant stated in any of his causes of action by a preponderance of the evidence then the plaintiff is not entitled to recover thereon as to the cause or causes of action so failing of support by a preponderance of evidence, and your verdict should be for the defendant thereon, in whole or in part, as the evidence justifies. The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proved. This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts.

It is your duty to determine upon all of the evidence and upon these instructions of the Court as to the law, whether the defendant is justly indebted to the plaintiff and if so, in what amount, or

whether the defendant is entitled to recover from the plaintiff damages and if so, in what sum.

You are charged that if the plaintiff substantially and faithfully performed his contracts made with the defendant you should return a verdict for the amount you find justly due him. Of course, the plaintiff is not entitled to the full amount claimed if he failed to do all of the work or furnish all of the materials which he contracted to do and furnish and you should make adjustments accordingly. [731]

In like manner, you should consider the claims of the defendant as stated in the evidence offered in support of the averments of his answer and cross complaint, and if you find from the evidence that the defendant is entitled to recover from the plaintiff damages arising from the failure of plaintiff to do the work and furnish the materials specified in the contracts, whether written or oral, then such damages should be deducted from any amount which you might find otherwise due to the plaintiff, and if those damages exceed the amount, if any, which you might find would otherwise be due to the plaintiff, a verdict should be rendered in favor of the defendant for the balance. It is your duty, as you know, to do equal justice between the parties to the action and you are the sole judges of all of the facts of the case.

As stated in the complaint, the plaintiff claims that there is due, owing and unpaid to him from the defendant the sum of \$17,174.16, together with interest thereon at the rate of six per cent per annum from the first day of March, 1951.

If the plaintiff is entitled to recover from the defendant in any sum, he is also entitled to recover interest on that sum from the date when the debt became due at the rate of six per cent per annum, which is the legal rate of interest in the Territory of Alaska as to debts of this nature where no specific rate of interest is set out in the contract or otherwise fixed by law. [732]

If you find that the plaintiff is not entitled to recover any sum whatever from the defendant and that the defendant is entitled to recover any sum from the plaintiff, interest may be allowed in like manner on the amount which you find due from the plaintiff to defendant from the date upon which you find the same became due.

Plaintiff's Exhibit 7 in this case is a letter dated December 28, 1950, addressed to the plaintiff by Lorn E. Anderson, the engineer who drew the plans and specifications on behalf of the defendant. Defendant has testified that Anderson was recommended to him by the Plaintiff. In his testimony, the defendant has denied that Anderson had any authority from the defendant to write the letter dated December 28, 1950.

If you find that Anderson had authority from the defendant to write such a letter and deliver it to the plaintiff, then the defendant is bound thereby to the same extent as though he had written the letter himself. If you find that Anderson had no authority from the defendant, specific or general, to write such a letter, then the defendant is not bound by the letter. However, if you find that the

defendant orally directed the plaintiff to do the work specified in the letter, the defendant would be obliged to carry out such oral agreement irrespective of the letter.

All questions of law, including the admissibility of [733] testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although every injury has the power to find a general verdict which includes questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately relate to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or

against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be [734] informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the

evidence offered [735] should be viewed with distrust.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to any other subject coming under your consideration and demanding your judgment.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity, or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to [736] any matter material to the case. However, the impeachment of

the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has [737] testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that

testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no circumstances should you resort to that method of adjusting differences of opinion among yourselves.

At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which [738] you have heard and the proper deductions therefrom and the law as given to you by the Court in these instructions. But arguments of counsel if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be

mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, on considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction [739] and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in

regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

When you retire to consider of your verdict you will take with you to the jury room the pleadings in the case, the exhibits, these instructions and two forms of verdict. You will thereupon elect one of your members foreman who is to speak for you and sign and date the verdict unanimously agreed upon. If you find for the plaintiff and against the defendant you will insert in the verdict which has been prepared for that contingency and which is marked "Verdict No. 1" the sum which you find that the plaintiff is entitled to recover of and from the defendant and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict.

Similarly, if you find that the plaintiff is not entitled to recover any sum whatever against the defendant, and that the defendant is entitled to recover from the plaintiff, you will [740] insert in the form of verdict which has been prepared for that contingency and which is marked "Verdict No. 2," the amount which you find the defendant is entitled to recover from the plaintiff and your foreman will thereupon date and sign that verdict and you will return the same into Court as your verdict.

If you find that neither party is entitled to recover any sum whatever from the other, then you

will still use Verdict No. 2, but will insert the word "no" in the blank space before the word "Dollars" and your foreman will thereupon date and sign the verdict and you will return the same into Court as your verdict. In this fashion you will find for the defendant and against the plaintiff but will further find that the defendant is not entitled to recover any sum whatever from the plaintiff. Under such a verdict, the defendant is entitled to recover his costs from the plaintiff but that is a matter of law with which you have no direct concern.

With your verdict you will return into Court the pleadings, the exhibits, these instructions and the form of verdict not used by you.

Dated at Anchorage, Alaska, this 6th day of October, 1952.

/s/ ANTHONY J. DIMOND,
District Judge.

Court: I think Instruction 4, as has been read to the jury, may possibly be misleading, even though the jury is instructed that the instructions must be considered as a whole, [741] so at the end of Instruction 4 as typed, I have written the following: "This instruction is subject to the foregoing instructions, especially 3-B with respect to substantial performance of contracts." Counsel may now come to the bench with the Reporter, to take exceptions to the instructions given and refused.

(Counsel and Reporter then approached the bench.)

Court: Counsel for plaintiff may first take exceptions.

Mr. Arnell: We have no exceptions, your Honor.

Court: Counsel for plaintiff takes no exceptions. What about your instructions refused—do you want to do anything about them?

Mr. Arnell: No; you substantially covered them by your instructions, your Honor.

Mr. Bell: The defendant takes exception to Instruction No. 1, on page 1, in which it reads as follows: "This action is based upon several contracts for the construction of a building, the building itself and additional finish work and other work pursuant to changes in the original plans whereby the plaintiff asserts that there became due and owing to him from the defendant a total sum of \$51,779.16, upon which the defendant has paid the sum of \$34,605.00, leaving a balance due and owing and unpaid from the defendant to the plaintiff in the amount of \$17,174.16." This is very confusing because there is only two written contracts before the Court, and by referring to [742] several contracts it is quite apt to confuse the jurors, and for the further reason it becomes an affirmative statement instead of a statement of the contention of the plaintiff.

Court: I think the criticism is valid; I am going to say "upon two written contracts and three alleged oral contracts"—maybe you will except to it anyway.

Mr. Bell: I am afraid that would help it but

wouldn't cure it, because we have nothing admitted except as to the two contracts.

Court: This is a statement of the plaintiff's claim.

Mr. Bell: If you had said "according to the plaintiff's contention, this is an action based upon certain things," then I wouldn't object, but you see it leaves an affirmative statement of the figures here—this is not the figure our checks total.

Court: I will insert "the plaintiff asserts that this action is based * * *" It will read now, "The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts."

Mr. Bell: At the bottom of the page, exception to these words: "such changes were made by oral agreement as to result in a final price of \$4,051.84."

Court: I think I will let that stand; I think it is clear that that is an assertion of the plaintiff and not in the statement the Court is making. [743]

Mr. Bell: I wish to except to the first 16 lines of Instruction 1, page 2, for the reason that it leads the jury to believe that the facts set out therein are established, and takes from the jury at least a certain per cent of the right in determining that some of these are disputed facts.

Court: I think that is clear.

Mr. Bell: Now, on Instruction 1, page 4, we wish to except to these words commencing on line 4, "You must remember that a considerable period of time has elapsed, approximately 11½ years, since the building went into the possession of the defendant, and hence, allowance must be made for

natural changes which would take place during that period even if all of the work contemplated by the contracts between the parties was done in good and workmanlike fashion." Now, I want an exception in full to the two last paragraphs of Instruction Number 3, as not stating the law on substantial performance and erroneously misleading in the words that are set forth, and I wish an exception to these words in Instruction 3-A, commencing in line 4, reading as follows: "and is one by which the building and structure as a whole is not impaired and is actually used after it is erected for its intended purpose and where the defects can be remedied by the owner without any great expenditure and without material damage to other parts of the property and may without injustice be compensated for by deductions from the contract price." I especially object to the word "large" in the [744] fourth line from the bottom as overemphasizing the explanation.

Court: I got that out of a book, which are not always right.

Mr. Bell: We object to the words commencing in Line 26 of Instruction Number 4, as follows: "The plaintiff should be allowed credit for that part or portion of his claim or demand, as respects any of his causes of action, that has been proved by a preponderance of the evidence, but not for any part or portion not so proved." Object to that on the theory that no substantial compliance has been proven. I think that is all. Now, your Honor, the

defendant has four instructions, and may I have you mark those and file them in the case?

Court: I have already marked them "refused except as covered by instructions given. Exception taken."

Mr. Bell: That's fine.

Court: You don't care to have yours filed, Mr. Arnell?

Mr. Arnell: No.

Court: I better make a note of it here. Defendant has requested four instructions in all, which have been considered by the Court; each of them is refused except as covered by instructions given and the defendant has taken an exception to the refusal of the Court to give each of the instructions as submitted, and the instructions so submitted may be incorporated in the record at this time.

(Counsel and Reporter leave the bench.)

Court: Ladies and gentlemen of the jury, after conference with Counsel I have made a change in Instruction Number 1, page 1. As originally stated, it would read, in the second paragraph, "This action is based upon several contracts for the construction of a building." That might be construed to mean that the judge is telling you that such is the case, whereas in this instruction I have tried only to put forward the contentions and claims of the parties, so I have changed it to read, "The plaintiff asserts that this action is based upon two written contracts and three alleged oral contracts for the construction of a building." The parties, I think, agree that they signed the two written

contracts, but they differ as to almost everything else, and you must remember in all of these instructions that I am not attempting to instruct you as to the facts of the case—that is your business, to determine the facts, and if you find any language here which you may think indicates that the Court is trying to instruct you on the facts, please disregard it. Do Counsel wish to stipulate for a sealed verdict?

Mr. Bell: I do.

Mr. Arnell: That's all right with me, your Honor.

Court: Bailiffs may be sworn.

R. E. Manchester and B. L. Willis were then sworn as Bailiffs.

Court: Ladies and gentlemen of the jury, it has been agreed that you may return what is known as a sealed verdict. [746] How many on the jury have acted on a jury rendering a sealed verdict? Many of you, but I am bound to read it to you: "Ladies and gentlemen of the jury: If you have not reached a verdict by 5 o'clock, p.m., today, then when you have agreed upon a verdict, have the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All of the jurors must be in the jury box in Court at 10 o'clock, a.m., of Tuesday, October 7, 1952, at which time the verdict will be handed to the Court and opened in the presence of the jury. Dated at Anchorage, Alaska, this 6th day of October, 1952. Signed Anthony J. Dimond, approved, E. L. Arnell, Plummer and Ar-

nell, Attorneys for Plaintiff, Bailey E. Bell, of Attorneys for Defendant." Ladies and gentlemen of the jury, you may now retire to consider of your verdicts. The Court will stand adjourned until tomorrow morning at 10:00 o'clock.

Thereupon, at 5:17 o'clock, p.m., October 6, 1952, the jury retired.

Be It Further Remembered that at 10:07 o'clock, a.m., October 7, 1952, the jury in the above entitled cause returned to the courtroom; all members of the jury panel being present and each answering to his or her name; the parties being present as heretofore, The Honorable Anthony J. Dimond, District Judge, presiding; [747]

And Thereupon, the following proceedings were had:

Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

Mr. Boward: We have, your Honor.

Court: You may present it to the bailiff. Although the jury has been continuously in session, the verdict is sealed; it is now opened. Two verdicts have been signed by the foreman; they may be read:

The clerk then read the following verdicts:

"In the District Court for the Territory of Alaska, Third Division, Victor Gothberg, an individual doing business as Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Defendant, No. A-7644." Verdict No. 1. "We, the jury, duly sworn and impanelled to try the above entitled cause, do find for the plaintiff and against the de-

fendant and do further find that the plaintiff is entitled to recover of and from the defendant the sum of Fourteen thousand two hundred fifty and 82/100 Dollars (\$14,250.82), together with interest thereon at the rate of six per cent (6%) per annum, from the 1st day of March, '51. Dated at Anchorage, Alaska, this 7th day of October, 1952. Signed: Nevin H. Boward, Foreman."

"In the District Court for the Territory of Alaska, Third Division, Victor Gothberg, an individual doing business as Gothberg Construction Company, Plaintiff, vs. Burton E. Carr, Defendant, No. A-7644." Verdict No. 2. "We, the jury, duly [748] sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the defendant the sum of Eight thousand one hundred thirty-one and 63/100 Dollars (\$8,131.63), together with interest thereon at the rate of six percent (6%) per annum from the 1st day of March, 1951. Dated at Anchorage, Alaska, this 7 day of October, 1952. Signed Nevin H. Boward, Foreman."

Court: I think you better take these verdicts back. These verdicts are only for your use, anyway, and I am not suggesting anything to you, but if you intend, and when I drafted the verdicts that is the way I expected to put it, if you wish to find that the defendant is entitled to recover of and from the plaintiff that sum of money, then strike out that word "defendant", and insert the word

“plaintiff”. As the verdict stands, it is meaningless. A man can’t recover any money from himself.

Mr. Boward: Would it be necessary, your Honor, to retire to the jury room?

Court: If the jury all agree, you can do it now; is that what you intended—that the defendant should recover from the plaintiff that sum of money? Do you all so agree?

(All members of the jury replied in the affirmative.)

Court: I think every juror has indicated consent. Very well, the foreman may come down and strike out that last “defendant”, and put the word “plaintiff” in. The clerk will [749] now read the verdict as so amended. Just read the body of it.

Clerk: “We the jury, duly sworn and impanelled to try the above entitled cause, do find for the defendant and against the plaintiff and do further find that the defendant is entitled to recover of and from the plaintiff the sum of Eight thousand one hundred thirty one and 63/100 Dollars (\$8,131.63), together with interest thereon at the rate of six percent (6%) per annum from the 1st day of March 1951.”

Court: Now the verdict now reads, ladies and gentleman, that the defendant is entitled to recover of and from the plaintiff the sum of \$8,131.63; is this your verdict, so say you all?

(All members of the jury replied in the affirmative.)

Court: Does anybody not agree to it? You have also heard Verdict No. 1 read, in which you have

given a verdict in favor of the plaintiff and against the defendant for \$1,425.82; is that your verdict, so say you all?

(All members of the jury replied in the affirmative.)

Court: Does either of counsel care to have the jury polled on either verdict, or both verdicts?

Mr. Arnell: The plaintiff doesn't.

Mr. Sanders: The defendant does not, your Honor.

Court: Very well; thank you for your patience and labor, ladies and gentlemen. This has been a tedious case, extending over a long period of time. Another trial goes on at 1:00 this [750] afternoon; if any of you wants to report at that time we would be pleased to have you.

Thereupon, at 10:15 o'clock, a.m., October 7, 1952, the trial by jury of the above entitled cause was concluded. [751]

[Endorsed]: Filed July 31, 1953.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Comes now the appellant, Victor Gothberg, pursuant to the provisions of Rule 75, Federal Rules of Civil Procedure, and designates for inclusion in the record on appeal the pleadings, proceedings and evidence following:

1. Plaintiff's amended complaint.
2. Defendant's answer to amended complaint.
3. Transcript of testimony of all witnesses.
4. All exhibits.
5. Defendant's motion for a directed verdict at the close of plaintiff's evidence.
6. Plaintiff's motion for a directed verdict at the close of all evidence.
7. Instructions to jury.
8. Verdicts No. One and No. Two of jury.
9. Order denying motions for judgment or new trial.
10. Judgment.
11. Notice of Appeal.
12. This designation.
13. Statement of points on appeal.
14. Journal entries.

/s/ E. L. ARNELL,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 29, 1953.

[Endorsed]: No. 13959. United States Court of Appeals for the Ninth Circuit. Victor Gothberg, an individual doing business as Gothberg Construction Company, Appellant and Appellee, vs. Burton E. Carr, Jane Doe Carr, his wife, Jack Akers and Sherman Johnstone, Appellees and Appellants. Transcript of Record. Appeals from the District Court for the Territory of Alaska, Third Division.

Filed: August 5, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13959

VICTOR F. GOTHBERG, Appellant,

vs.

BURTON E. CARR, Appellee.

ADOPTION OF STATEMENT AND
DESIGNATION

Comes now Victor F. Gothberg, Appellant, by his attorney, E. L. Arnell, pursuant to the provisions of Rule 17 of the Rules of this Court, and hereby adopts for all purposes of this appeal the designa-

tion of record and statement of points contained in the record heretofore filed in this Court.

Dated this 17th day of August, 1953.

/s/ E. L. ARNELL,
Attorney for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' STATEMENT OF POINTS
ON CROSS-APPEAL

Comes now the above named Appellees and for their statement of points relied upon on Cross-Appeal, set forth the same as follows:

1. The Court erred in overruling the Defendants' motion for Judgment dismissing the Plaintiff's various causes of action at the close of the Plaintiff's testimony.

2. The Court erred in overruling the Defendants' motion for a Judgment of dismissal of the Plaintiff's various causes of action at the close of all of the evidence.

3. The Court erred in overruling the Defendants' motion for Judgment notwithstanding the verdict, for the reasons set forth in the Motion itself, and especially the reason that the undisputed evidence showed a complete failure to comply with the terms

of the written contract and a complete failure of substantial compliance, and the Judgment of the trial court should have been for a dismissal of the Plaintiff's various causes of action and a denial of any recovery to the Plaintiff whatsoever.

4. The Court erred in refusing to give Defendants proffered Instruction No. 1.

5. The Court erred in refusing to give Defendants proffered Instruction No. 2.

6. The Court erred in refusing to give Defendants proffered Instruction No. 3.

7. The Court erred in refusing to give Defendants proffered Instruction No. 4.

Dated at Anchorage, Alaska, this 3rd day of August, 1953.

BELL & SANDER,

/s/ By BAILEY E. BELL,
Attorneys for Appellees, Burton E. Carr, Jack Akers and Sherman Johnstone.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 6, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF RECORD

Comes now the Appellees, Burton E. Carr, Jack Akers and Sherman Johnstone, pursuant to the provisions of Rule 75 and other Federal Rules of Civil Procedure, and designates and includes in the rec-

ord on appeal, the pleadings, proceedings and evidence as follows, in addition to the designation of record of the Appellant:

1. Plaintiffs' Original Complaint;
2. Defendants' Answer to Original Complaint;
3. Notice of Cross-Appeal filed by Appellees;
4. This Designation;
5. Appellees' Statement of Points on Appeal;
6. Defendants' Offered Instruction No. 1, which was refused by the Court and an exception allowed;
7. Defendants' Offered Instruction No. 2, which was served and filed by the Defendants below and refused by the Court and an exception allowed;
8. Defendants' Offered Instruction No. 3, which was duly served and tendered to the Court and filed, the giving of which was refused by the Court and an exception allowed to the Defendants;
9. Defendants' Offered Instruction No. 4, which was duly served, offered to the Court, and filed, and the giving thereof refused by the Court, and an exception allowed to the Defendants.

Dated at Anchorage, Alaska, this 3rd day of August, 1953.

BELL & SANDERS,

/s/ By BAILEY E. BELL,

Attorneys for Appellees, Burton E. Carr, Jack Akers, and Sherman Johnstone.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 6, 1953. Paul P. O'Brien, Clerk.

